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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Dennis R. Patrick, Chairman

James H. Quello

Patricia Diaz Dennis

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-464

In re Applications of	
105.3 LTD.	File No. BPH-860826MA
WAYNE L. DILUCENTE	File No. BPH-860827MB
Wayne S. Moody and Joan Winters d/b/a CHARLOTTE BROADCAST PARTNERSHIP	File No. BPH-860827MC
MARSHALL W. ROWLAND, JR.	File No. BPH-860827MI
B.F.J. TIMM	File No. BPH-860827MK

For Construction Permit for a New FM Station on Channel 287A (105.3 MHz) in Solana, Florida

MEMORANDUM OPINION AND ORDER

Adopted: September 30, 1988; Released: October 13, 1988

By the Review Board: MARINO (Chairman), and BLUMENTHAL. Board Member ESBENSEN absent.

1. Before the Board are (1) a "Motion for Leave to File Petition for Extraordinary Relief and Motion for Stay", (2) a "Motion for Stay", and (3) an " Appeal and Petition for Extraordinary Relief", all filed by B.F.J. Timm (Timm) on September 20, 1988.

2. Cumulatively, the various motions seek the Board's extraordinary intervention into the hearing proceeding so as to interdict the reporting of certain information regarding Timm and Wayne DiLucente, as required by Administrative Law Judge Edward J. Kuhlmann (ALJ) in his *Memorandum Opinion and Order*, FCC 88M-2980, released September 13, 1988. The ALJ requested the information in connection with a proposed settlement of the styled proceeding.

3. Timm concedes that he has not complied with the procedures specified in Section 1.301(b) of the Commission's Rules, 47 CFR §1.301(b) (. . . appeals from interlocutory rulings of the presiding officer shall be filed only if allowed by the presiding officer). Instead, he claims that the rule was ignored because:

> In light of the ALJ's disinclination to evaluate the settlement presented to him, it is highly unlikely that Timm would be given permission for leave to file this appeal pursuant to Section 1.301(b) of the Commission's rules.

4. It is well-established that applicants must exhaust their administrative remedies before the presiding officer. *See, e.g., Rebecca Radio of Marco*, 3 FCC Rcd 4016 (Rev. Bd. 1988). As has been frequently reaffirmed, failure to comply with Section 1.301(b) will result in a dismissal of an appeal, unless it is shown that an ALJ has committed "egregious error" or a "flagrant abuse of discretion." *See Communications Satellite Corp.*, 32 FCC 2d 533 (1971). *See also Ronald Sorensen*, FCC 88R-48, released August 17, 1988; *Charisma Broadcasting Corporation*, 2 FCC Rcd 2979 (Rev. Bd. 1987); *Jan - Di Broadcasting, Inc.*, 93 FCC 2d 890 (Rev. Bd. 1983). Timm's sole justification here for not seeking permission to file his appeal from the ALJ's ruling is his apprehension of the ALJ's later "disinclination" to allow such an appeal.

5. Timm's three motions will be dismissed as improper before the Board. Moreover, we are constrained to observe that even if the motions were properly before us, we would not necessarily grant the prayers for relief. The ALJ's *Memorandum Opinion and Order* observed:

> The parties propose, pursuant to agreements, granting the application of Wayne L. DiLucente and amending Mr. DiLucente's application to change from an individual appliant to a corporate applicant called West Florida Media, Inc., in which DiLucente will hold 50% of the stock and B.F.J. Timm will hold the remaining 50%. CBP, 105.3, and Rowland's applications would be dismissed. 105.3 will receive250,000,CBP350,000 and Rowland 200,000. DiLucente's application appears to be the proposal that he and Timm are now pursuing because that application has FAA approval for its proposed antenna site and Timm's proposal does not.
>
> Both Timm and DiLucente have declared that they did not enter the proceeding for the purpose of reaching or carrying out a settlement. If they had failed to make that declaration the settlement could not be approved. The prohibition against entering a licensing proceeding for the purpose of settlement is stated in §73.3525(a)(2) and the Communications Act §311(c)(B). The hearing record of this proceeding raises an issue about whether Timm and DiLucente's declarations in this regard exhibit bad faith. But before any conclusion is reached about that, Timm and DiLucente will be given an additional opportunity to further substantiate that they did not enter the proceeding for the purpose of settlement. If, after responding to this order, the facts still raise an issue about their intentions, an appropriate issue will be designated and a further hearing held.

The ALJ also recited, at some length, the concerns he had arising out of past and current transactions between DiLucente and Timm, and he directed these parties to file additional information within a time certain, so that a

determination could be made that the pending settlement agreement would not contravene the "public interest" standard of Section 311 of the Communications Act.

7. In light of the wide latitude and discretion afforded Commission ALJs, *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986)(. . . ALJs must be given broad discretion to regulate the course of multiparty comparative hearings.); *Marlin Broadcasting of Central Florida, Inc.*, 2 FCC Rcd 2025 (Rev. Bd. 1987)(ALJ has wide latitude under our rules to deal with the exigencies of a hearing), and the clear mandates of the Communications Act §311(c)(3)(B) and Section 73.3525(a)(2) of the Commission's Rules, the ALJ is well within his authority to solicit information necessary to make the required legal findings. While the law strongly favors settlement, the Commission has made it clear that it will seek further information where necessary to assure that a proposed settlement fully complies with FCC rules and policies. *See, e.g., James V. Steele*, FCC 88I-089, released September 7, 1988. Here, the information sought by the ALJ is said to be required to determine whether Timm or Wayne DiLucente have abused the Commission's application process by the filing of disingenuous or duplicative broadcast applications, all for the primary purpose of achieving propitious settlements. Without suggesting in the slightest that such conduct has occured here, we note the Commission's recent concern for abuses in the settlement process. *See generally Rules and Policies Relating to Broadcast Renewal Applicants, Competing Applicant, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, FCC 88-212, released August 16, 1988. The Commission is equally concerned about possible abuses of process in conventional comparative hearings. *See, e.g., In Re: Inquiry Into Abuses of Commission's Processes by Broadcast Applicants,* FCC 88-250,released August 4, 1988.[1]

8. ACCORDINGLY, IT IS ORDERED That, the Motion for Leave to File Petition for Extraordinary Relief and Motion for Stay; Motion for Stay; and Appeal and Petition for Extraordinary Relief, filed by B.F.J. Timm on September 10, 1988 ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTE

[1] At the same time, the Board would disassociate itself from the dictum of the ALJ in the following vein:

> Timm holds complete or controlling interest in 12 radio stations and 16 2/3% in another. B.F.J. Timm Exh. 2. Nine are in Florida and four are in the adjoining state of Georgia. Id. He also owns a cable system in Georgia. On June 16, 1988, he had four additional radio applications pending for two facilities in Florida and two in California. His selection in a comparative proceeding with this proposal is unlikely, if possible at all; it is a comparative proposal without any merit.

Memorandum Opinion and Order at para. 4. Nothing in the Communications Act or the Commission's Rules and policies precludes a multiple station owner from competing for a new broadcast license. Further, as the ALJ is well aware, many of our recent applicants for new broadcast facilities have been shams, *see Religious Broadcast Network*, FCC 88R-38, released July 5, 1988, at para. 8, or have been disqualified for lacking the basic licensing criteria, and multiple station owners have ultimately prevailed. *See, e.g., Lee Optical*, 2 FCC Rcd 5480 (Rev. Bd. 1987). Consequently, the fact that an applicant controls other media properties is not a basis for questioning the *bona fides* of a new application; and if a proposed settlement is questioned solely on that basis, the Board would likely find a "flagrant abuse of discretion." Here, however, the ALJ has stated additional grounds for his caution. *Memorandum Opinion and Order* at paras. 5-9.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-38

In the Matter of

Review of the Technical and
Operational Requirements of
Part 76, Cable Television

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: August 4, 1988; Released: October 11, 1988

By the Commission: Commissioner Dennis issuing a separate statement.

INTRODUCTION

1. The Commission is proposing to extend the technical signal quality guidelines it adopted for Class I cable channels in the *Report and Order* in this proceeding[1] to the television (video) signals on Class II, III, and IV cable channels.[2] The Commission intends to maintain its existing policy which precludes state and local technical regulations that exceed these federal guidelines. The Commission is examining technical guidelines that may be applied to the nonvideo signals on Class III and IV cable channels. These guidelines currently serve as both the non-mandatory federal signal quality standards for Class I cable channels and the maximum performance standards that may be applied, but not exceeded, by state and local franchising authorities in their regulation of cable systems. This action is in response to a ruling by the U.S. Court of Appeals for the District of Columbia Circuit in *City of New York v. FCC (City of New York)* [3] that vacated the portion of the Commission's decision in the *Report and Order* that pre-empted state and local technical regulation of Class II, III, and IV cable channels and remanded the issue to the Commission for further proceedings. The court directed the Commission to consider the propriety of its pre-emption of cable technical standards for these classes of cable channels in light of the franchise renewal provisions of the Cable Communications Policy Act of 1984 (Cable Act).[4]

2. We believe that application of our Class I channel guidelines to the television signals on the other classes of cable channels while at the same time maintaining our federal pre-emption policy would resolve the court's concern. Specifically, the court was concerned that local franchising authorities be provided with adequate flexibility to establish objective standards for evaluating cable signal quality as part of the franchise renewal process mandated by the Cable Act. Under this proposal, we would provide non-mandatory guidance to local franchising authorities concerning the level of technical standards that we believe may be appropriate for television signals on Class II, III, and IV cable channels. We make this proposal under the presumption that in the case of cable television, most government-mandated technical standards are generally not needed to ensure that subscribers receive satisfactory service quality. In this regard, while the standards proposed herein would ensure the provision of a certain minimum quality of service, we do not believe they pose an undesirable constraint on the design and operation of most cable systems.

BACKGROUND

3. The Commission initially adopted cable technical rules in 1972, as part of its action in the *Cable Television Report and Order*.[5] Under these rules, cable systems were required to meet specified minimum standards of signal quality performance for Class I (broadcast) channels. The signal quality requirements of these rules, as provided in Section 76.605, were intended to define a basic level for quality of service to be provided to subscribers, based on the principle that broadcast signals should be carried without material degradation.[6] Class II, III, and IV channels were not subject to any federal technical regulations. At that time, the Commission decided to allow franchising authorities to require more stringent technical standards if they chose to do so.[7] Subsequent to the adoption of these rules, local franchising authorities began imposing their own generally divergent and often inconsistent technical standards on cable systems.[8] The Commission found that these locally-imposed standards were sometimes unworkable and undermined its goal of promoting an efficient and innovative cable service. It stated that stringent technical standards for programming on Class II channels made use of access channels prohibitively expensive; and that incompatible local technical standards threatened the ability of cable systems to network their product, hindered the development of new cable services such as data transmission, and could impede the development and marketing of signal source, transmission, and terminal equipment.[9] Therefore, in 1974, in light of these actual and potential problems, the Commission restricted franchising authorities from imposing technical standards more stringent than those provided in its rules.[10]

4. In the *Report and Order* in this proceeding, we examined the need for maintaining federally enforced technical signal quality standards for Class I cable channels. We found that, since the adoption of our cable technical standards, the cable industry had matured, the technical state of the art in cable equipment had improved, and competition from other video services had increased such that cable systems now have strong incentives to provide quality service. We thus determined that market forces are a more effective means to ensure that cable systems provide signals of acceptable quality than federal regulation. In view of this finding and the fact that state and local regulatory authorities would retain authority to adopt technical standards under our new policy, we concluded that mandatory federal standards were no longer necessary or desirable. Accordingly, we stated that we would no longer enforce any specific technical standards for cable system signal quality. However, in considering this matter, we also found that it was necessary to continue our policy of pre-empting state and local technical signal quality regulations that exceed federally recognized minimum performance levels. We stated that "[t]echnical standards that vary from community to community create potentially serious negative consequences for cable system

operators and cable consumers in terms of the cost of service and the ability of the industry to respond to technological changes."[11] We concluded, therefore, that the reasons underlying this policy appeared to be as valid today as they were in 1974 when the policy was first adopted.[12]

5. To implement these policy decisions, we amended Part 76, Subpart K of our rules to provide that the technical signal quality specifications for Class I cable channels contained therein would no longer be required minimum performance standards, but instead, would, henceforth, serve only as voluntary guidelines.[13] In addition, we preserved our pre-emption policy by providing that the new guidelines may be applied but not exceeded by franchising authorities in their regulation of the technical quality of Class I cable channels. We also continued to pre-empt any regulation of Class II, III, and IV channels by local franchising authorities. Inasmuch as we did not promulgate any standards specifically applicable to Class II, III, and IV channels, this action effectively exempted the technical aspects of these channels from all government regulation. In preserving our pre-emption policy, we found that the Cable Act did not limit our authority with regard to technical regulation of cable systems and that there was nothing in the statute or its legislative history that indicates Congress intended to alter our 1974 pre-emption policy in this area.

6. *The Remand Decision.* On March 20, 1987, the U.S. Court of Appeals for the District of Columbia Circuit reviewed the Commission's *Report and Order* in its decision in *City of New York*. In a divided opinion, the court upheld our authority under the provisions of Section 624 (Regulation of Services, Facilities and Equipment) of the Cable Act to pre-empt the technical standards of local franchising authorities with our own Class I channel standards.[14] The court observed that Section 624(b)(1) of the Cable Act delegated to franchising authorities the right to establish requirements for facilities and equipment provided by a cable operator and that Section 624(a) limits such regulatory authority to the extent that it is consistent with the Cable Act. However, it also noted that Section 624(e) states that the Commission may establish technical standards relating to the facilities and equipment of cable systems. The court reasoned that the authority to curtail a franchisor's freedom of action in the technical area was delegated to the FCC, "at least insofar as the FCC's 'technical standards' overlap the franchisors' specifications of certain 'services, facilities and equipment.'"[15] The court concluded that the Commission's interpretation that it has the authority to pre-empt any franchisor standard that exceeds its own standard was persuasive and that nothing in the Cable Act or the legislative history "suggests Congress' intent to modify the FCC's past practice - at least with respect to Class I channels."[16] The court further ruled that our broad authority allows us to decide that "a certain level of regulation is *all* that is desirable" (footnote omitted).[17]

7. The court also held, however, that our rule making, as it pertained to Class II, III, and IV cable channels, was defective because we failed to consider the interrelationship between Section 626 (Renewal) of the Cable Act and our pre-emption of technical standards for these classes of cable channels.[18] The court observed that the franchise renewal provisions of Section 626 require franchisors to consider the quality of a cable operator's signal when considering his application for renewal. The court, therefore, vacated our revised rule as it relates to Class II, III, and IV channels and remanded the matter to us for further proceedings.

8. On May 16, 1988, the U.S. Supreme Court affirmed the decision in *City of New York* that the Commission did not exceed its statutory authority by establishing technical standards governing the quality of Class I cable television signals and pre-empting local authorities from imposing more stringent technical standards.[19] In reviewing the decision in *City of New York* the Supreme Court stated that "in a situation where state law is claimed to be preempted by federal regulation, a 'narrow focus on Congress' intent to supersede state law [is] misdirected,' for '[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law.'"[20] It explained that rather, "if the agency's choice to pre-empt 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'"[21] In affirming the judgment of the Court of Appeals, the Supreme Court ruled that "we find nothing in the Cable Act which leads us to believe that the Commission's decision to pre-empt local technical standards governing the quality of cable signals 'is not one that Congress would have sanctioned.'"[22]

9. In its review, the Supreme Court observed that when Congress enacted the Cable Act in 1984, it acted against a background of federal pre-emption in this area. The Supreme Court noted that, for the preceding ten years, the Commission had pre-empted state and local technical standards under its broad delegation of authority under the Title 47 of the U.S. Code to make rules and regulations and prescribe restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of the communications laws as a means of implementing its legitimate discretionary power to determine what the public convenience, interest, or necessity requires.[23] It observed that its decision in *Capital Cities Cable, Inc. v. Crisp*,[24] which was handed down during the time Congress was considering the legislation that became the Cable Act, broadly upheld the Commission's pre-emptive authority in very similar respects.[25] The Supreme Court reasoned that Section 624 of the Cable Act sanctioned in relevant respects the regulatory scheme that the Commission had been following since 1974. It stated that it was quite significant that nothing in the Cable Act or its legislative history indicated that Congress explicitly disapproved of the Commission's pre-emption of local technical standards, and it doubted that Congress intended to overturn the Commission's decade-old policy without discussion or even any suggestion that it was doing so.[26] Thus, the Supreme Court concluded that petitioners' claim that Section 624 of the Cable Act gives them authority to specify any technical standards that do not conflict with Commission standards disregards the Commission's own power to pre-empt which Congress did not, in the Supreme Court's opinion, take away in the Cable Act.[27]

10. The basic thrust of the court of appeal's objection to the *Report and Order* was that we did not adequately address the relationship between our decision to permit no technical regulation of certain classes of cable channels and the franchise renewal provisions of Section 626 of the Cable Act. This section sets forth the procedure franchisors are to follow for renewing cable franchises and

describes the bases upon which franchisors may conclude that renewal either is or is not warranted. Section 626(c)(1) provides that when a cable operator applies for renewal of a franchise, the franchising authority must either renew the franchise or preliminarily deny the application and, upon request, begin a public administrative proceeding to determine whether the cable operator's franchise ought to be renewed. Section 626(c)(1)(B) requires the franchising authority to consider four factors when making such a determination, one of which is whether "the quality of the operator's service, *including signal quality*, response to consumer complaints, and billing practices . . . has been reasonable in light of community needs (emphasis added)." Section 626(d) provides that if the franchising authority denies a franchise renewal after a public administrative proceeding, that denial must be based on an "adverse finding" such as poor signal quality. The court of appeals concluded that the Cable Act "thus requires franchisors to consider the quality of a cable operator's signal when considering his renewal application"[28] and that the Commission's decision not to enact signal quality standards for Class II, III, and IV cable channels might preclude franchisors from carrying out this statutory obligation.

DISCUSSION

11. Before turning to a specific response to the court of appeal's remand decision, it is appropriate to place the general question of cable television technical standards regulation and the Commission's role in this area in context. The Commission began the process of considering cable television technical standards in a formal fashion in 1965.[29] As noted above, standards were actually adopted for Class I channels in 1972.[30] During this period, the Commission was explicit that its standards were not intended to place any barrier in the way of franchising authorities adopting "more stringent technical standards."[31] This policy of permitting divergent standards at the local level did not succeed in promoting appropriately tailored regulations that did not conflict across franchise jurisdictions, and in 1974, the Commission pre-empted all inconsistent state and local regulation of Class I signals and barred all state and local regulation of non-Class I signals.[32]

12. In the years that followed, and as the communications markets involved became increasingly more competitive, the Commission focused its attention more generally on the question of how it should regulate in the technical standards area and on the possible negative consequences in terms of innovation and increased costs that improperly formulated standards created. Noting the severe penalties imposed by the market for offering a poor quality of service and the technical advances that were taking place, the Commission expressed its view that the pressure of competition and consumer choice have brought about a generally higher level of technical quality than is required by our rules.[33] This view was specifically reflected in our decision in this proceeding to no longer impose cable television signal quality technical standards at the federal level. In most situations this was judged to be an area where market forces, through direct feedback from consumers to their cable operators, were well suited to determining the quality of service that is provided.[34] This is also an approach we have begun to implement in eliminating signal quality standards for broadcast station performance which has opened the way for greater efficiency and innovation without creating any deterioration in the quality of over-the-air service provided.[35]

13. The elimination of federal involvement in technical standards enforcement raised, however, the possibility of restrictive, divergent, and conflicting state and local regulations applicable to cable signal quality developing in a manner that would be both adverse to the interests of individual cable consumers and inconsistent with an efficient interstate communications system. The policies adopted in our *Report and Order* in this proceeding were specifically intended to address this possibility. In taking this action the issue before us was primarily what effects such state and local regulations might have on cable technical development on a nationwide basis outside those that might occur in any specific franchise area as the consequence of improper or inappropriate regulations imposed on consumers by their own local governments. That is, our concern has been not so much with whether the technical standards a local franchising authority might establish would restrict or hinder cable service to consumers in its local area as with possible negative effects on consumers elsewhere. With respect to cable channels delivering television broadcast signals (Class I channels), this analysis and the Commission's decision relating thereto was specifically affirmed by both the court of appeals and the Supreme Court.

14. The difficulty apprehended by the court of appeals in the remand portion of its decision was with reconciling the Commission's lack of standards for Class II, III, and IV channels with the Cable Act's instruction to franchising authorities to consider "the quality of the operator's service, including signal quality" in the franchise renewal process. The core service on which cable television operations have historically been based is the delivery of broadcast signals. Because the same cable, amplifiers, and maintenance effort are responsible for the delivery of all cable services, if the system is capable of providing broadcast signals to consumers at an acceptable level of quality this provides considerable assurance that the other services delivered over the common plant will also not be degraded in quality. Thus, in our *Report and Order* in this proceeding we continued to preclude technical quality regulation on channels other than those used to deliver broadcast signals with some confidence that appropriate judgments could still be made as to the operation of the system as a whole in the renewal process. The technical quality of signals on other video channels has not previously been subject to regulation with the expectation in mind that there might be a need for cable operator flexibility to experiment with different transmission formats on these channels. Moreover, for most services on these non-broadcast channels, at least in the early years, an extra charge for the service was levied on the consumer, increasing the system operator's market incentive to deliver the service at an acceptable quality level. However, in response to the court's decision, and in order to accommodate the interests of franchising authorities in the renewal process as required by the Cable Act, we now believe it is appropriate to consider extending the policy adopted for Class I cable channels to television transmissions on Class II, III, and IV cable channels. This would, if adopted, apply specific non-mandatory federal technical standards for signal quality to these classes of cable channels. These standards would serve as an upper limit on the signal quality standards that could be imposed on cable

systems by local franchising authorities. With federal guidelines as a ceiling for these classes of cable channels, there would be no question that signal quality standards were available to local authorities to be applied as needed to fulfill their obligations under Section 626 of the Cable Act. We believe that this proposal, while not necessarily required by the court's decision, would satisfy the court's concern that our rules not preclude franchisors from carrying out their statutory responsibilities.

15. This proposal would reverse our long-standing policy of exempting the non-broadcast television cable channels from all signal quality regulation. In light of the provisions of Section 626 of the Cable Act, it now appears appropriate to permit state input and participation in the review of the technical performance of these channels. When our pre-emption policy was originally adopted, the television services provided by Class II, III, and IV cable channels were in a developmental stage and the Commission believed that any technical regulation of these channels was more likely to stifle their growth and development than to promote it. The public access and cable-originated program services (both pay and non-pay) provided by cable systems have developed in the intervening years to an extent that we believe these services are no longer in the incipient stage, and we therefore do not believe that the standards proposed herein would pose a practical constraint on the provision of these services. Thus, any standards that may be established by local authorities consistent with our ceiling policy would not be expected to seriously impact the growth of television services on the other classes of cable channels. Our proposal also would permit local authorities unlimited flexibility to set standards less stringent than our guidelines on these channels. On the other side, our proposal to preclude local standards that exceed our federal guidelines would ensure that cable service to the public is adequately protected from divergent and conflicting technical regulations at the local level by more than 23,000 franchising authorities. These inconsistent regulations hinder interstate communications by creating impediments to technical innovation and imposing unnecessary additional costs on the provision of such service.

16. We propose to adopt the signal quality guidelines that now apply to Class I channels for television signals on Class II, III, and IV cable channels that are intended to be displayed on NTSC receivers.[36] We believe the same "broadcast quality" approach used in developing the Class I channel standards is also appropriate for these other classes of cable channels. These standards would define a level of television service on Class II, III, and IV cable channels that is of the same quality as that which cable subscribers have been accustomed to in viewing broadcast services on Class I channels. Moreover, we believe that the signal quality provided on these channels by the vast majority of cable systems already meets these standards. We believe that any well maintained cable system should be able to meet or exceed our signal quality guidelines on Class II, III, and IV channels as well as Class I. We also observe that since all these classes of cable channels share the same physical facility or conduit *(i.e.,* must be transmitted through the same "wire" and processing equipment), the quality of one class of channel can potentially affect the quality of the other channel classes. In view of the above considerations, we believe that the most logical and efficient approach to establishing technical performance guidelines would be to apply the same regulations to all television signals. In the case of encoded signals on Class III and IV cable channels, signal performance would be measured only after any decoding or related processing activities.

17. Although we are proposing to apply our Class I signal quality guidelines to video signals on Class II, III, and IV cable channels, commenters should address any problems they forsee with this approach. We do not wish to rule out, at this stage of the proceeding, consideration of other options. We plan to displace local government decision making only to the extent necessary to avoid adverse effects to our interstate communications system and to carry out the policies expressed in Section 624 of the Cable Act. In commenting on our proposals, we encourage parties to address whether it might be possible to meet our federal objectives of promoting efficient and innovative cable service with less displacement of local decision making, and if so, to specify how that might be accomplished. Parties may wish to comment, for example, on whether alternatives such as permitting local governments to impose signal quality standards for certain classes or subclasses of cable channels or for specific aspects of cable signal quality might still permit the Commission's and Congress' goals to be achieved. If, in the alternative, commenters believe that it is appropriate to continue our pre-emption policy but that it is undesirable to apply Class I standards to the video signals on Class II, III, and IV cable channels, they should address whether alternative standards or no standards should apply. Commenters who believe that no standards should apply are asked to address the Commission's authority to adopt a scheme in which the states are pre-empted from applying local standards. Specifically, and consistent with the court of appeals' decision in *City of New York*, commenters who propose this approach should discuss whether such a scheme could comport with Section 626 of the Cable Act.

18. We also seek comment on what standards should be established for nonvideo signals on Class III and IV channels. Included within this category of communications would be, for example, audio signals and the signalling information that is communicated from the residences of individual subscribers to cable system headends in conjunction with subscriber response systems. Inasmuch as the standards governing video signals are inappropriate for these signal types, it is unclear at this juncture what standards should be established for these types of transmissions. Such communications constitute an extremely varied category insofar as they generally do not use uniform formats or signalling techniques and require considerable flexibility for specific applications. We seek comment, therefore, on what type of standards or review process might properly be applied in this area.

19. We remain concerned, however, about the possibility that technical regulations could retard the development of nonvideo services. Furthermore, since technological developments will undoubtedly lead to new types of service offerings, it may not be possible to develop standards that would cover every possible service offering. We seek comment, therefore, on whether we should continue our pre-emption policy and decline to establish standards for the technical quality of nonvideo signals. In addition, we seek comment on whether technical standards for nonvideo signals are necessary for franchising authorities to perform their franchise renewal functions under the Cable Act.[37]

REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS

20. Pursuant to the Regulatory Flexibiity Act of 1980, the Commission finds:

I. *Reason for action.* Franchising authorities are hampered in carrying out responsibilities mandated in the Cable Act by the absence of federal guidelines with respect to cable technical standards for certain classes of cable channels. We propose to adopt such federal technical guidelines.

II. *Objectives.* The rules proposed herein would allow franchising authorities to carry out their responsibilities as mandated by Section 626 of the Cable Act, with respect to evaluation of a cable operator's signal quality in the franchise renewal process.

III. *Legal basis.* This action is in furtherance of Sections 1, 302, 303, 304, 307, 308, 309, 624 and 626 of the Communications Act of 1934, as amended.

IV. *Description, potential impact and number of small entities affected.*

The rules proposed herein would extend the non-mandatory, federal benchmark signal quality standards to Class II and III cable channels. A cable system will be required to meet these standards at the discretion of its local franchising authority. We are unable, therefore, to estimate the exact number of cable systems that will be affected by this rule proposal.

V. *Reporting, record keeping and other compliance requirements.* None.

VI. *Federal rules which overlap, duplicate or conflict with this rule.* None.

VII. *Any significant alternatives minimizing impact on small entities and consistent with the stated objectives.* None.

PROCEDURAL MATTERS

21. Written comments are requested on the initial regulatory flexibility analysis. These comments must be filed in accordance with the same filing deadlines as comments on the rest of this *Further Notice of Proposed Rule Making*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of the *Further Notice of Proposed Rule Making*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub.L.No. 96-354, 94 Stat. 1164, 5 U.S.C. §601 *et seq.*) (1981).

22. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

23. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding, and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

24. Pursuant to applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **December 12, 1988,** and reply comments on or before **January 11, 1989.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

25. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose no new or modified requirements or burdens on the public.

26. Accordingly, IT IS PROPOSED THAT Part 76 of the Commission's rules and regulations BE AMENDED as set forth in the attached Appendix.

27. This *Further Notice of Proposed Rule Making* is issued pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

28. For further information concerning this proceeding, contact Judith Herman, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX

47 CFR Part 76 is proposed to be amended as follows:

1. The authority citation for Part 76 would continue to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. 47 CFR 76.605 is proposed to be amended by revising paragraph (a) to read as follows:

Sec. 76.605 Technical standards.

(a) The following requirements apply to the performance of a cable television system as measured at any subscriber terminal with a matched termination, and to the delivery of a television (video) signal on each channel in any of the classes of cable television channels the system may provide (*i.e.*, Class I, Class II, Class III, and IV as defined in §76.5(t)-(w) of this chapter). In the case of encoded signals on Class III and Class IV channels, signal performance shall be measured only after any decoding or related processing.

* * * * *

FOOTNOTES

[1] *See Report and Order* in MM Docket No. 85-38, 102 FCC 2d 1372 (1985).

[2] The Commission's rules define four classes of cable television channels: 1) Class I- Cable channels devoted to delivery of standard broadcast television signals; 2) Class II- Cable channels used to deliver non-encoded, non-broadcast cable programming such as cable networks, and private commercial, public, educational, and government access services; 3) Class III- Cable channels used for delivery of nonvideo communications and encoded video programming; and 4) Class IV- Cable channels with two way interactive capability allowing subscribers to transmit signals to other points in the cable system. The "downstream" signal goes from the cable headend to a subscriber terminal. The "upstream" signal goes from a subscriber terminal to another point in the cable television system. *See* 47 CFR §76.5(t)-(w); *see also Cable Television Report and Order*, 36 FCC 2d 141, 198-199 (1972).

[3] 814 F. 2d 720 (1987), *aff'd on other grounds*, 108 S. Ct. 1637 (1988).

[4] Pub.L. No. 98-549, Stat. 2779 (1984) (Codified at 47 U.S.C. §§521-559 (Supp. II 1984)).

[5] *See Cable Television Report and Order* 36 FCC 2d 200, 204 (1972).

[6] *See* 47 CFR §76.605. The Section 76.605 signal quality standards include: 1) the frequency boundaries of cable channels delivered to subscriber terminals; 2) the frequency tolerance of visual carriers; 3) the frequency tolerance of aural carriers; 4) the minimum visual carrier levels at subscriber terminals; 5) the allowable tolerance for visual carrier level variations within 24 hours; 6) the maximum and minimum aural carrier levels with respect to visual carrier levels; 7) the maximum allowable level of visual low frequency distortion; 8) the frequency response of each channel; 9) the allowable visual signal-to-system noise level and to any co-channel signal; 10) the allowable level of intermodulation distortion; and 11) the minimum amount of isolation between subscriber terminals. This section also provides requirements regarding signal leakage by cable systems.

[7] *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, 359 (1972).

[8] The Commission noted examples of its experience with local authorities in *Clarification of the Cable Television Rules and Notice of Proposed Rule Making and Inquiry*, 46 FCC 2d 175, 187 (1974).

[9] *See Amendment of Part 76 of the Commission's Rules and Regulations Relative to the Advisability of Federal Preemption of Cable Television Technical Standards or the Imposition of* a *Moratorium on Non-Federal Standards, Report and Order* in Docket No. 20018, 49 FCC 2d 470, 477-480 (1974).

[10] *Id.*

[11] *Report and Order*, 102 FCC 2d at para. 11.

[12] *Id.* at para. 14.

[13] The guidelines also included some revisions to the specific provisions of the former mandatory technical standards. *See Report and Order*, at paras. 19-21.

[14] *City of New York*, 814 F. 2d at 726. One member of the three judge panel dissented, contending that the majority had sanctioned pre-emption without a clear manifestation of Congressional intent.

[15] *Id.* at 725.

[16] *Id.* at 726.

[17] *Id.*

[18] *Id.* at 726-727.

[19] The Court did not review the decision, in *City of New York*, to vacate the Commission's rules with respect to Class II, III, and IV cable television signals and remand it to the Commission for further proceedings. The Court held that this was not an issue before it. 108 S. Ct. at 1641.

[20] 108 S. Ct. at 1642, *citing Fidelity Federal Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 154 (1982).

[21] 108 S. Ct. at 1642, *citing United States v. Shimer*, 367 U.S. 374, 383 (1961).

[22] *City of New York*, 108 S. Ct. at 1645.

[23] *See* 108 S. Ct. at 1643, *citing* 47 U.S.C. §§303 and 303(r).

[24] 467 U.S. 691, 700-705 (1984).

[25] 108 S. Ct. at 1643.

[26] 108 S. Ct. at 1644.

[27] 108 S. Ct. at 1645.

[28] *City of New York*, 814 F. 2d at 727.

[29] *Notice of Inquiry and Notice of Proposed Rule Making* in Docket 15971, 1 FCC 2d 453, para. 62 (1965).

[30] *Cable Television Report and Order*, 36 FCC 2d 143 (1972).

[31] *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, 359-60 (1972).

[32] *Amendment of Part 76 of the Commission's Rules and Regulations Relative to the Advisability of Federal Preemption of Cable Television Technical Standards or the Imposition of a Moratorium on Non-Federal Standards*, Report and Order in Docket 20018, 49 FCC 2d 470 (1974).

[33] *Report and Order*, 102 FCC 2d at para. 6.

[34] *Report and Order*, 102 FCC 2d at para. 1.

[35] *A Re-Examination of Technical Regulations, Report and Order* in Gen. Docket 83-114, 99 FCC 2d 903 (1984).

[36] The standards that are now applicable to Class I signals, and which we propose to extend to Class II, III, and IV video signals, are based on 6 MHz NTSC signals. In MM Docket No. 87-268, the Commission is considering advanced television (ATV) issues including those relating to the conformance of ATV signals with existing NTSC standards. *See Notice of Inquiry*, 2 FCC Rcd 5125 (1987) and *Tentative Decision and Further Notice of Inquiry*, FCC 88-288 (September 1, 1988). In view of the fact that the Class I standards were written with NTSC standards in mind, were not intended to be applicable to other types of television signals, and ATV signal conformance with the NTSC standard is under consideration in MM Docket No. 87-268, we believe it premature to consider the advisability of signal quality standards for ATV, especially at this early stage in its development. Once we decide the standards issue in the ATV proceeding, we can revisit this matter.

[37] It should be noted, in this regard, that the Cable Act applies only to what it defined specifically as cable services. These are defined as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service . . . ." 47 U.S.C. §522(5). The legislative history includes an extended discussion of those cable services addressed by the Cable Act and those non-cable services such as, for example, data delivery services that are not covered by the Cable Act. House Committee on Energy and Commerce, H.R. Rep. No. 934, 98th Cong., 2nd Sess. (1984) pp. 41 *et seq.*

SEPARATE STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

In Re: Review of the Technical and Operational Requirements of Part 76, Cable Television.

Because of the Court of Appeals's decision, we must reexamine our regulation of cable signal quality. Under the Cable Act, local franchising authorities must evaluate signal quality as part of the franchise renewal process. By setting standards, we provide guidance to local authorities and promote uniformity throughout the industry.

In this case, as in many others, setting standards is a matter of timing. Set them too early, and you can frustrate innovation. Set them too late, and you run the risk that service will be delayed because of uncertainty. As this Notice suggests, we might decide to set national standards for video services and decline to set standards for some or all of the non-video signals on Class III and IV cable channels. I hope comments will make specific proposals as to which services are ripe for standards and which ones we should leave unregulated for now.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ELCOTEL LD*OS, INC. File No. I-T-C-88-174

Application for authority to operate as an international resale carrier

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 28, 1988; Released: October 12, 1988

By the Chief, International Facilities Division:

1. The captioned application, filed on July 29, 1988, by Elcotel LD*OS, Inc. (LD*OS), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on August 10, 1988. No comments were received.

2. LD*OS is already providing domestic resale service. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by LD*OS.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-88-174 IS GRANTED, and LD*OS is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2, between the United States, and those points are now or may hereafter be listed in those tariffs.

5. Copies of any operating agreements entered into between LD*OS and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that LD*OS shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in the Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-88-179

Application for authority to make available half-interests in MAUOs in the TAT-8 cable system

ORDER AND AUTHORIZATION

Adopted: September 28, 1988; Released: October 12, 1988

By the Chief, International Facilities Division:

1. The captioned application, filed on August 4, 1988 by American Telephone and Telegraph Company (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to dispose of certain half-interests in Minimum Assignable Units of Ownership (MAUOs) in the TAT-8 cable system. The application was placed on public notice on August 10, 1988. No comments were received. Upon consideration of the application, we find that grant of the application is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-88-179 IS GRANTED, and AT&T is authorized to make available the following numbers of half-interests in MAUOs in the TAT-8 cable system to MCI International, Inc. (MCII), TRT Telecommunications Corporation (TRT) and GTE Hawaiian Telephone Company Incorporated (HTC) as follows:

From/ Between:	To/ Between	Half-Interest In MAUOs	European Landing Point
AT&T/France[1]	TRT/France	60	Penmarch, France
AT&T/Sweden	MCII/Sweden	30	Penmarch, France
AT&T/Germany	MCII/Germany	90	Penmarch, France
AT&T/Switzerland	MCII/Switzerland	23	Penmarch, France
AT&T/Germany	HTC/Germany	1	Penmarch, France

3. No substantial changes inconsistent with this or any other relevant Commission order shall be made before final execution of agreements between AT&T and MCII, TRT and HTC, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

4. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] *See* Note 2 in Schedule C of the TAT-8 C&MA.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT TELECOMMUNICATIONS CORP. File No. I-T-C-88-185

Application for authority to acquire and operate facilities for direct service to Israel.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 28, 1988; Released: October 12, 1988

By the Chief, International Facilities Division:

1. The captioned application, filed on August 9, 1988, by TRT Telecommunications Corp. (TRT), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate facilities for the provision of direct service to Israel. The application was placed on public notice on August 24, 1988. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Israel by TRT.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-88-185 IS GRANTED, and TRT is authorized to:

a. lease from WU World Communications Inc. and operate six telegraph-grade (50-band) half circuits in a previously authorized voice-grade circuit between the U.S. and Israel; and

b. use said facilities to provide TRT's regularly authorized services between the U.S. and Israel and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between TRT and its correspondent in Israel, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. This authorization is effective on its release date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

5. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-88-180

Application for authority to acquire and operate 141 Digital Circuit Multiplication System Terminals for service to various international points

ORDER AND AUTHORIZATION

Adopted: September 28, 1988; Released: October 12, 1988

By the Chief, International Facilities Division:

1. The captioned application, filed on August 3, 1988 by the American Telephone and Telegraph Company (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire, install and operate 141 Digital Circuit Multiplication System (DCMS) terminals for the provision of its authorized services between the U.S. and various international points. The application was placed on public notice on August 10, 1988. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-88-180 IS GRANTED, and AT&T is authorized to acquire, install and operate 141 DCMS terminals and use these facilities to derive additional satellite circuits for the provision of its regularly authorized services between the U.S. and those points listed in the Appendix hereto and beyond.

3. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

DCMS Implementation Schedule

Country or Location	1988	1989	Total
Argentina		2	2
Australia	4	1	5
Austria		1	1
Bahamas		1	1
Bahrain	1		
Barbados		1	1
Belgium		3	3
Belize		1	1
Bermuda		1	1
Brazil		2	2
Colombia		3	3
Dominican Republic		3	3
France	5		5
Germany		10	10
Guam		1	1
Haiti		1	1
Hong Kong	3	1	4
India	1	1	2
Ireland		2	2
Israel	2	2	4
Italy	1	3	4
Jamaica		4	4
Japan	8	7	15
Korea		9	9
Luxembourg		1	1
New Zealand		1	1
Netherlands		4	4
Netherlands Antilles		1	1
Nordics*		2	2
Portugal		1	1
St. Lucia		1	1
Singapore		1	1
South Africa		2	2
Spain		1	1
Sweden	1	1	2
Switzerland		4	4
Taiwan		2	2
Trinidad		1	1
United Kingdom	18	14	32
Totals	44	97	141

* Both terminals will be located in Copenhagen, Denmark and will be shared among Denmark, Finland and Norway.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NYNEX Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs — AAD 7-1678

MEMORANDUM OPINION AND ORDER

Adopted: September 27, 1988; Released: October 11, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In the *Joint Cost Order*,[1] the Commission required certain subject carriers, including the NYNEX Telephone Companies (NYNEX),[2] to file manuals for separating the costs of regulated telecommunications services from the costs of nonregulated activities. In response to this requirement, NYNEX filed a cost allocation manual on August 14, 1987. That manual described NYNEX's nonregulated activities, listed the activities NYNEX proposed to treat as incidental activities, and provided information on NYNEX's affiliate transactions, employee time reporting procedures, and cost apportionment methods.

2. We reviewed that manual in the *NYNEX Order* [3] and found that certain areas of the manual required clarification or revision. Despite these problem areas, we conditionally approved the manual. We determined that the manual provided adequate assurances against the misallocation of costs and revenues between regulated and nonregulated activities to permit its implementation on January 1, 1988. We required, however, that NYNEX submit revisions addressing each of the specified problem areas. We stated that these revisions would be subject to public comment and our review, and that we would take all appropriate action, including the prescription of specific apportionment procedures, in the event we disapproved any part of the revised manual.[4]

3. NYNEX submitted its revisions on March 14, 1988, and further revised its manual on August 23, 1988. The March 14 revisions provide additional information regarding the problem areas identified in the *NYNEX Order* and, according to NYNEX, comply fully with that Order.[5] MCI Telecommunications Corporation (MCI) and the New York State Department of Public Service (NYDPS) have commented on these revisions, and NYNEX has replied. The August 23 revisions propose changes to certain portions of the nonregulated activity, affiliate transaction, and time reporting sections of the manual. No party commented on these revisions.

4. After reviewing the pleadings and the contents of NYNEX's revised manual, we find, subject to certain exceptions, that it is consistent with the Commission's requirements for cost allocation manuals and properly implements the *NYNEX Order*. Before turning to these exceptions, we wish to emphasize that this Order does not discuss the many areas that no party has asked us to address in which NYNEX has complied fully with Commission requirements and the *NYNEX Order*. We also wish to emphasize that the exceptions are very limited in relation to the manual as a whole. Accordingly, we approve NYNEX's revised manual including the August 23, 1988 revisions, subject to the filing of additional information and revisions specified herein. This filing shall be made no later than December 31, 1988.

5. In the *NYNEX Order*, we stated that NYNEX would be required to make all revisions we approved or ordered effective as of January 1, 1988.[6] We recognize that such retroactivity may not be reasonably practicable with regard to certain additional changes we require in this Order. We direct NYNEX to make all such changes effective January 1, 1988 to the maximum extent possible, and to identify in the transmittal to its filing which changes, if any, it cannot reasonably implement as of January 1, 1988, and the justification for not implementing changes retroactively.[7]

II. DISCUSSION

A. Overall Sufficiency of the Revised Manual

6. Under the *Joint Cost Order*, each cost allocation manual must describe the nonregulated activities, incidental activities, affiliate transactions, employee time reporting procedures, and cost apportionment methods of the telephone operating companies that will apply it. In the *NYNEX Order*, we required NYNEX to provide additional, and, in certain instances, corrected information regarding each of these areas. We were particularly concerned with the methods NYNEX proposed for assigning costs to cost pools and for apportioning cost pools between regulated and nonregulated activities. We found those methods important because the costing system established in the *Joint Cost Order* requires telephone companies to divide the accounts and subaccounts listed in the Commission's Uniform System of Accounts (USOA) into homogeneous cost categories or pools that can be directly assigned to, directly or indirectly attributed to, or allocated between regulated and nonregulated activities on a cost-causative basis.[8]

7. Although we ordered NYNEX to provide additional information regarding its cost pool assignment and apportionment methods, we did not require NYNEX to identify and justify the reporting codes, accounting records, and records of charges to accounts that support those methods. We determined, despite MCI's argument to the contrary, that such information would not be necessary for us to evaluate NYNEX's overall apportionment system.[9]

8. In its revised manual, NYNEX provides extensive additional information regarding its cost pool assignment and apportionment methods. While NYDPS and MCI recognize that this information makes the manual more understandable, they argue that many of NYNEX's cost pool assignment and apportionment methods remain vague.[10] These parties draw different conclusions from this alleged lack of specificity. NYDPS asserts that NYNEX's cost allocation manual will serve only as a general guide for apportioning costs between regulated and nonregulated activities. NYDPS suggests that our manual review process cannot eliminate all biases the manual may have against proper allocation and that we should require further changes to the manual on the basis of subsequent audits.[11]

9. MCI, in contrast, argues that we must require NYNEX to provide more thorough descriptions of its cost pool assignment and apportionment methods in order to evaluate the manual properly and that we should require that information at this time. MCI claims that NYNEX's entire costing process continues to rely on the review and analyses of fundamental accounting records and reporting codes that the manual neither fully explains nor justifies. MCI contends that NYNEX should be required to describe these records and codes more precisely, and to justify using them as the basis for apportioning costs between regulated and nonregulated activities.[12] MCI argues further that we should clarify the procedures we intend to employ in auditing and overseeing the cost allocation manual process. In MCI's view, these procedures should make clear that telephone companies must make their fundamental cost data available to their independent auditors and to the Commission, and should specify how the Commission intends to review and test that data. In addition, MCI maintains that we should state the processes we will employ to review independent auditor reports and to obtain any relevant cost data that the independent auditors do not review.[13]

10. In response, NYNEX contends that NYDPS and MCI have not shown that the manual is inconsistent with the *NYNEX Order*. NYNEX asserts that its manual complies fully with that Order because it: describes the data sources and methods NYNEX uses to identify and apportion each cost pool; provides the Commission and the independent auditors with a clear understanding of how costs are to be gathered and identified; and clarifies the types of analyses, reviews, and surveys that are used to determine various cost apportionment factors. In NYNEX's view, the additional information MCI seeks would add unnecessary detail to the manual, would impede its review, and is not required by the *Joint Cost Order*.[14] Finally, NYNEX maintains that MCI's concerns regarding Commission access to the fundamental cost data underlying the manual are misplaced. NYNEX states that existing requirements guarantee that telephone companies will retain a complete audit trail of all cost allocations and affiliate transactions, and will make independent audits and auditor workpapers available to the Commission.[15]

11. We find that NYNEX's revised manual generally complies with the *NYNEX Order*. In that Order, we declined to require NYNEX to identify and justify the reporting codes, accounting records, and records of charges to accounts that support its cost pool assignment and apportionment methods. We found that requiring NYNEX to describe those methods in greater detail would be sufficient to eliminate any ambiguities and deficiencies in the manual.[16]

12. Our review of the manual confirms that it now contains sufficient information for us to evaluate virtually all of NYNEX's cost pool assignment and apportionment methods. We required additional information regarding those methods for two reasons. First, we wanted to ensure that the Commission, NYNEX, and the independent auditors would share a common understanding of NYNEX's manual. We are satisfied that the revised manual achieves this purpose. A more detailed manual would not increase our ability or the independent auditors' ability to verify proper implementation of the manual.[17]

13. Our second reason for requiring additional information regarding NYNEX's cost pool assignment and apportionment methods was to enable us to review the substantive merit of those methods that NYNEX had not adequately explained. In virtually all instances, the revised manual contains sufficient information to let us perform this review. As discussed below, we require additional information regarding a limited number of NYNEX's cost pool assignment and apportionment methods. However, the Commission has determined that cost allocation manuals need not include the reporting codes, accounting records, analytical steps, and other procedures that NYNEX has developed to implement its apportionment methods.[18] Accordingly, we reject MCI's request that we require NYNEX to provide an additional level of detail regarding its overall cost pool assignment and apportionment methods.

14. We agree with MCI, however, that the data gathering procedures and documentation underlying the apportionment procedures set forth in the manual are critical in any decision as to the reasonableness of the amounts assigned or allocated to nonregulated activities. However, that does not justify inclusion of such material in the manual to the extent that the resulting document is so cumbersome as to obscure its primary purpose – the comprehensive description of how the carrier complies with the Commission's cost apportionment policies and rules.[19] It may well be that our audits or our review of the independent auditor reports will reveal problems not with the apportionment procedures themselves, but with the underlying data collection and recording procedures. If this is the case, we will require revisions in the apportionment results and, if necessary, disallow for ratemaking purposes those costs that have been improperly included in the carrier's regulated accounts.

15. We also decline to specify the precise procedures we will employ in auditing and overseeing the cost allocation manual implementation process. While we intend to examine cost allocation and other accounting procedures in the course of our regular carrier audits and our review of independent auditor reports,[20] the procedures we will employ will be tailored to the circumstances we encounter. We emphasize, however, that telephone companies must retain a complete audit trail of all cost allocations and affiliate transactions, and must make that information as well as the independent audit and all related data and workpapers available to the Commission.[21] We will, of course, require further changes to the manual in the event our own audits or our review of the independent auditor reports reveal a need for such action.[22]

B. Incidental Activities

16. In its initial manual, NYNEX proposed to treat "Custom Work" as an incidental activity.[23] Since that manual contained insufficient information for us to evaluate whether "Custom Work" met the criteria for treatment as an incidental activity, we required that the revised manual provide sufficient information for us to determine the scope of this activity.[24] In response, NYNEX provided a more detailed definition of this activity.[25] We find that this definition encompasses activities that do not qualify for incidental treatment.

17. The revised manual classifies "engineering services provided to nonaffiliated entities, of a technical or specialized nature" as custom work.[26] These engineering services, the manual states, "include the alteration, design, repair and maintenance of telephone systems and communications facilities of nonaffiliated entities" as well as "[r]earrangements of company owned [telephone] plant

[that] take place at the request of the customer."[27] These parts of NYNEX's definition encompass customer premises equipment (CPE) and inside wiring services that the Commission has preemptively deregulated, and, as such, are not eligible for incidental treatment.[28] In addition, the manual classifies "cable installation for cable television companies" as custom work. That activity constitutes a separate line of business and accordingly cannot qualify for incidental treatment.[29] We require that NYNEX amend its manual to eliminate all preemptively deregulated activities as well as cable installation for cable television companies from its definition of custom work.

C. Affiliate Transactions

18. *Sales Agency*. In its initial manual, NYNEX proposed to use the "value of the services performed" to determine the costs of certain marketing activities that NYNEX Business Information Systems Company (BISC) performs for NYNEX. We determined that this proposal was inconsistent with the Commission's requirement that all services affiliates provide for carriers, including those provided under sales agency plans, be offered in accordance with the costing methodology set forth in the affiliate transactions rules. We required NYNEX to specify, in its revised manual, that the costing methodology of those rules would apply to BISC's marketing activities.[30] We stated, in footnote 37 of the *NYNEX Order*, that "if NYNEX can demonstrate a generally-available price it pays to its sales agents, that generally-available price should be recorded for BISC's marketing activities."[31]

19. In its revised manual, NYNEX proposes to have BISC market network services to NYNEX's small business customers "at the generally available price paid in substantial transactions with non-affiliated sales agents under Sales Agency Plans."[32] NYDPS contends that this proposal is inconsistent with the Commission's affiliate transaction rules and with paragraph 130 of the *Reconsideration Order*.[33] According to NYDPS, these rules and paragraph 130 require that nonregulated affiliates provide services only at the affiliates' costs unless the affiliates have established market prices through transactions with non-affiliated enterprises. Although NYDPS recognizes that footnote 37 appears to be inconsistent with this standard, NYDPS assumes that we did not intend to waive this standard for NYNEX. In reply, NYNEX contends that its proposal complies with footnote 37 and that our holding in that footnote is fully consistent with the affiliate transaction rules.[34]

20. We agree with NYDPS that footnote 37 of our *NYNEX Order* is inconsistent with the Commission's affiliate transactions rules. Those rules require that services that nonregulated affiliates provide carriers, such as the marketing services BISC provides NYNEX, normally be recorded on the carrier's books "in a manner that complies with the standards and procedures for the apportionment of joint and common costs between the regulated and nonregulated operations of the carrier entity."[35] There is only one general exception to this costing methodology. That exception permits the carrier to record an affiliate's services at the market rate "when the same services are also provided by the affiliate to unaffiliated persons or entities."[36] Contrary to footnote 37 of our *NYNEX Order*, there is no general exception from the use of fully allocated costs that might apply because a carrier obtains services from a non-affiliate.[37] Accordingly, we require NYNEX to amend its description of BISC's marketing activities to provide terms that comply with the affiliate transaction rules.

21. *Transactions between Nonregulated Affiliates*. The affiliate transactions section of NYNEX's revised manual addresses only transactions between NYNEX's telephone operating companies and its nonregulated affiliates. NYDPS contends that transactions between nonregulated affiliates can also affect carrier costs. This could occur, according to NYDPS, if one nonregulated affiliate were to charge another nonregulated affiliate prices that deviate from the first affiliate's fully allocated costs and the second affiliate were to incorporate those prices into prices that it charges an affiliated carrier. NYDPS recommends that we should prevent abuses of this nature by requiring carriers to include documentation and verification of transactions between the service providers and the other nonregulated affiliates in their audit workpapers.[38] NYNEX's response argues that NYDPS' concerns regarding transactions between nonregulated affiliates lie outside the scope of this proceeding, which NYNEX asserts is being conducted to ensure that NYNEX's manual properly implements the Commission's cost allocation and affiliate transaction rules.[39]

22. While NYNEX correctly describes the scope of this proceeding, we are concerned that NYDPS and NYNEX may be misinterpreting the affiliate transactions rules in a way that may have significant ratepayer impact. Accordingly, we find it appropriate to clarify the operation of those rules in relation to affiliate transactions that incorporate products and services that one nonregulated affiliate has provided to another. We restrict our discussion to transactions for which there is no prevailing company price. Having been appraised of this explanation, we expect NYNEX to comply with it. We believe that this clarification is sufficient to allay NYDPS' concerns without imposing additional requirements on NYNEX.

23. When a nonregulated affiliated sells an asset for which there is no prevailing company price to a carrier, the affiliate transaction rules require that the carrier record the sale at "the lower of the asset's cost to the originating activity of the affiliated group less all applicable valuation reserves, or their fair market value."[40] This reference to "the originating activity of the affiliate group" makes clear that carriers cannot properly inflate the costs of assets purchased from nonregulated affiliates by charging inflated prices for transactions between nonregulated affiliates. If a carrier obtains an asset from a nonregulated affiliate that has obtained the asset itself (or a product or service that was used to create the asset) from another nonregulated affiliate, the cost the carrier records for the transaction must reflect the second affiliate's costs unless the second affiliate has established a prevailing company price for the asset (or for the product or service that was used to create the asset).[41]

24. Similarly, as we have already indicated,[42] when a nonregulated affiliate provides a carrier with a service for which there is no prevailing company price, the affiliate transaction rules mandate that the carrier record the transaction at a cost that complies with the Commission's "standards and procedures for the apportionment of joint and common costs between the regulated and nonregulated operations of the carrier entity."[43] These standards and procedures are described in Section 64.901 of the Commission's Rules,[44] and implicitly assume that the carrier and, by extension, the nonregulated affiliate, will be ap-

portioning only those costs that have been recorded in compliance with the affiliate transactions rules. Therefore, when a nonregulated affiliate uses assets or services obtained from a second nonregulated affiliate to provide services to a carrier, the costs recorded by the carrier must reflect the actual costs the second affiliate incurred in creating the asset or providing the service unless the second affiliate has established a prevailing company price for the asset or service.

25. If a carrier obtains an asset or service from a nonregulated affiliate that has obtained the asset or service (or a product or service that was used to create the asset or provide the service) from another nonregulated affiliate, information describing the transaction between the nonregulated affiliates, of course, must be included in the complete audit trail that carriers are to keep of their affiliate transactions. The independent auditor should examine that information, and all related data and workpapers must be made available to the Commission.[45]

26. *Pricing of Services.* The revised manual proposes that certain material management services that NYNEX Materiel Enterprises Company (MEC) provides NYNEX be "recorded at fully allocated costs."[46] NYDPS argues that the use of "recorded" indicates that NYNEX may intend to pay more than MEC's fully allocated costs for these services. NYDPS contends that NYNEX should be required to pay no more than its fully allocated costs for all assets and services that it obtains from nonregulated affiliates.[47] In reply, NYNEX maintains that the Commission has specifically declined to regulate the actual prices of affiliate transactions.[48]

27. We find that NYNEX's proposed treatment of MEC's material management services is consistent with the affiliate transaction rules. Those rules address the way in which carriers record affiliate transactions in regulated accounts, not the prices at which nonregulated affiliates sell assets and services to carriers.[49] Moreover, in the *Reconsideration Order*, the Commission determined that regulating the way in which carriers record affiliate transactions would adequately protect ratepayer interests.[50] Therefore, we reject NYDPS's proposal that NYNEX be required to pay no more than its fully allocated costs for assets and services it obtains from nonregulated affiliates.

28. *Sale of Scrap Metal.* Unlike NYNEX's initial manual, the revised manual lists the sale of scrap material to MEC as a service NYNEX provides to MEC. NYNEX proposes to price this service "at market rates (same rates [charged to] non-affiliates)."[51] We believe that scrap material is an asset and that the Commission's rules regarding asset transfers should govern its sale to MEC. In addition, we are uncertain whether the procedure NYNEX intends to follow to establish a market rate for these sales would be consistent with the Commission's requirements regarding asset transfers from a telephone operating company to a nonregulated affiliate.[52] Therefore, we require that NYNEX amend its manual to list the sale of scrap material to MEC as an asset transfer and to specify terms for such sales that comply with the Commission's rules governing such transactions.

29. *Reciprocal Services.* In the *NYNEX Order*, we required NYNEX to clarify its proposed treatment of certain services, referred to as reciprocal services, that certain of NYNEX's nonregulated affiliates provide their telephone operating companies.[53] Although the revised manual provides that clarification, NYNEX now proposes to calculate the costs of these transactions by apportioning residual costs "based on attributed expenses."[54] NYNEX's proposal is inconsistent with the Commission's requirement that residual costs be allocated in the same proportion as the apportionment of all expenses that have been directly assigned, directly attributed, or indirectly attributed.[55] NYNEX shall amend its manual accordingly.

30. *Real Estate Brokerage Services.* In its initial manual, NYNEX proposed that NYNEX Properties Company (NYNEX Properties) provide the operating companies with real estate services at prices "based on prevailing market practices and conditions." We ordered that NYNEX either explain how this methodology complies with the affiliate transaction rules or substitute a methodology that complies with these rules.[56] In response to this requirement, the revised manual indicates that NYNEX "may" be paying brokerage commissions to NYNEX Properties when NYNEX Properties acts as the listing broker for properties that NYNEX sells or leases to a third parties.[57] According to the manual, these commissions do not exceed "fees paid to nonaffiliated brokers in the same or comparable transactions."[58] We believe that this methodology is also inconsistent with our determination that transactions between a carrier and unaffiliated entities are insufficient to establish market prices for services that a carrier receives from a nonregulated affiliate.[59] NYNEX shall amend its manual accordingly.

D. Time Reporting

31. *Procedures for Capturing Nonproductive Time.* In its initial manual, NYNEX proposed to use a combination of positive time and exception time reporting to record employee time. Employees subject to positive time reporting were required only to "report time spent on work activities, according to that manual."[60] Since it was unclear how these reports would enable NYNEX to capture the costs of the nonproductive time of the employees who use positive time reporting, we ordered NYNEX to state in its revised manual the procedures it will use to capture these costs.[61]

32. In its revised manual, NYNEX states that the supervisors of employees subject to its positive time reporting systems "report[] the employee[s'] nonproductive time to the payroll preparer for input into the payroll system."[62] The manual indicates that employees subject to these systems continue to report only "time spent on work activities," but does not indicate how supervisors determine the amount of nonproductive time to report.[63] We believe that the methods NYNEX's supervisors use to make this determination is an essential part of NYNEX's procedures for capturing nonproductive time costs for its positive time reporting systems. Accordingly, NYNEX shall include a description of these methods in the revisions required herein.

33. *Procedures for Capturing Nonproductive Time for Employees Subject to Exception Time Reporting.* Our Order also required NYNEX to describe, in its revised manual, the procedures it uses to capture the costs of the nonproductive time of its employees subject to exception time reporting when that time occurs in increments of less than one hour.[64] NYNEX has not complied with this requirement, and must do so in the revisions required herein.

34. *Coverage of NYT's Time Reporting Systems.* The *NYNEX Order* required that NYNEX clarify the coverage of its time reporting systems.[65] While NYNEX has complied with this requirement as it relates to NET, the revised manual states that one group of NYT employees

uses "MTR (Mechanized Time Reporting)," that another group uses "IFAMS (Integrated Force Administrative/Mechanized System)," and that a third group, consisting of "New York Telephone employees not subject to MTR" uses "PTR (Payroll Time Reporting)" to report time.[66] We believe that NYNEX intended this third group to consist of "all New York Telephone employees not subject to MTR or IFAMS." NYNEX must amend its manual to remove this apparent inconsistency.

E. Apportionment Proposals

Account 2002 - Property Held for Future Telecommunications Use, Account 2003 - Telecommunications Plant under Construction - Short Term, and Account 2004 - Telecommunications Plant under Construction - Long Term

35. In its revised manual, NYNEX lists twelve identical cost pools for each of these accounts. Two of these pools are for direct regulated and direct nonregulated investment. The remaining pools are for common investment items such as land and motor vehicles. [67] NYNEX states that it divides these accounts into the respective cost pools by reviewing accounting records that identify the investment associated with each property item included in the accounts. NYNEX states further that this review lets it categorize the investment associated with each property item as regulated, nonregulated or common and to assign that investment to corresponding cost pools.[68]

36. Although NYNEX has adequately explained how it divides these accounts into regulated, nonregulated, and common costs, we believe that NYNEX must be following an additional step to assign common costs to the ten common cost pools it lists for these accounts. We also believe that this additional step consists of categorizing the investment previously identified as common to each of the specific functions for which NYNEX has cost pools within these accounts. The results of this further categorization would then be used to assign the common investment within these accounts to the cost pools. NYNEX shall either amend its manual to reflect its use of this method or explain the method that it follows.

Account 2116 - Other Work Equipment

37. Both the initial and the revised manual propose a cost pool for special tools and work equipment within this account. In the initial manual, NYNEX proposed to apportion this cost pool between regulated and nonregulated activities in proportion to the distribution of Account 2114 - Special purpose vehicles. Although we approved that proposal,[69] the revised manual proposes to use the combined distribution of Account 2112 - Motor vehicles and Account 2114 as the apportionment factor for this cost pool.[70] This apportionment factor is inconsistent with NYNEX's statement in the revised manual that its special tools and work equipment "relate[] to another special investment account, Special Purpose Vehicles."[71] While we would have no objection to the proposed apportionment factor if NYNEX were to use its special tools and work equipment to support motor vehicles as well as special purpose vehicles, NYNEX must clarify its procedures for this cost pool.

Account 2321 - Customer Premises Wiring

38. In the *NYNEX Order*, we directed NYNEX to show in its revised manual precisely how its accounting and cost allocation procedures for inside wiring operations will result in the allocation to nonregulated activities of all current inside wiring costs.[72] We imposed this requirement because ambiguities in the initial manual suggested that NYNEX was proposing to record current costs associated with detariffed inside wiring operations in Account 2321 and to assign these costs directly to regulated activities.[73]

39. In its revised manual, NYNEX states that it records no current inside wiring cost in Account 2321.[74] This manual also states that NYNEX's installation and repair personnel report time to work operation codes that identify the specific activity performed. According to the manual, the work operation codes used to report inside wiring maintenance are associated with a keep cost code that personnel in such groups as product management and advertising use for exception time reporting.[75] The manual states that all costs associated with this code "are accumulated, reported and separated from regulated costs on a monthly basis."[76]

40. Although the revised manual provides some additional information on NYNEX's inside wiring practices, that information is not entirely responsive to our requirement that NYNEX show precisely how its accounting and cost allocation procedures for inside wiring operations will result in the allocation to nonregulated activities of all current inside wiring costs. Therefore, we require that NYNEX submit such a showing with the revisions required herein.

41. While we will not attempt to specify precisely how NYNEX might show that its procedures for inside wiring are sufficient, we believe that NYNEX should discuss at least two matters that its revised manual fails to address. First, since NYNEX should be apportioning to nonregulated activities all costs associated with the keep cost code it uses for inside wiring, we believe that NYNEX should list the cost pools in which the costs associated with that code are accumulated. Second, since we requested information regarding the installation as well as the maintenance of inside wiring, NYNEX should clarify whether non-installation personnel report costs to the code or codes that NYNEX uses for inside wiring installation. This information should be in addition to any other information that NYNEX might require to complete its showing.

Account 4360 - Other Deferred Credits

42. The revised manual divides this account into a cost pool for outside plant related deferred credits and a residual cost pool. The first of these cost pools is being directly assigned to regulated activities, and NYNEX proposes that the residual cost pool be attributed to regulated and nonregulated activities in proportion to the combined distribution of its total plant in service accounts.[77] In view of the direct assignment of deferred credits related to outside plant, we believe that the apportionment factor for this residual cost pool should exclude the distribution of outside plant accounts. NYNEX shall amend its manual accordingly.

Accounts 5001 - Basic Area Revenue through Account 5302 - Uncollectible Revenue - Other, and Account 7991 - Nonregulated Revenues

43. In the *NYNEX Order*, we stated that NYNEX must list Accounts 5001 through 5302 in its cost table.[78] Our Order also required that the revised manual specify that NYNEX would apportion its uncollectible revenues from its telecommunications operations in proportion to its relative telecommunications revenue and its other uncollectible revenues in proportion to its relative non-telecommunications revenue.[79]

44. In its revised manual, NYNEX proposes to assign Accounts 5001 through 5302 directly to regulated activities. NYNEX states that it charges all nonregulated revenues and all nonregulated uncollectible revenues directly to Account 7991.[80] The revised manual, however, neither lists Account 7991 in the cost table nor explains how NYNEX determines the amount of uncollectible revenue to record in that account.

45. Although NYNEX's use of Account 7991 is consistent with the Commission's accounting rules, it is essential to our monitoring efforts that the cost manual list any account in which NYNEX records revenues derived from nonregulated activities to which the manual apportions costs. It is also essential that the manual specify the procedures NYNEX employs to divide its uncollectible revenue among its revenue accounts. NYNEX shall amend its manual accordingly.

Account 6623 - Customer Services Expense

46. The revised manual states that NYNEX employs a three-step process to assign the service ordering processing expenses recorded in this account to cost pools. In the first step, NYNEX uses functional accounting data to separate these expenses into service order expenses and customer contact expenses. In the second step, NYNEX disaggregates these customer contact expenses into customer contact expenses and toll inquiry expenses. NYNEX states that it uses "specific functional accounting reporting and tracking codes and functional work activity reports" to perform this step.[81] According to the manual, these reports "are the output of a Company maintained customer contact survey reporting system used for measuring Customer Business Office type operations."[82] The third step consists of "group[ing] together" the "functions" into cost pools for dedicated regulated - toll inquiry, dedicated nonregulated, customer account related, and service order related expenses.[83] The manual does not state how this grouping process is performed.

47. NYDPS objects to these procedures. NYDPS asserts that the activity reports employed in NYNEX's second step were the subject of extensive investigation and testimony in NYT's most recent rate case before the New York Commission. NYDPS states that these reports assign work units based on customer contacts and worktime coefficients. NYDPS states further that the coefficients have not been updated since prior to divestiture, and thus would be unlikely to reflect the amount of time dedicated to customer contact services, such as account servicing and service order negotiation and processing, that include nonregulated functions. NYDPS urges that we not allow NYNEX to use worktime coefficients to assign its service ordering processing expenses to cost pools until it performs new function time studies to develop coefficients that are likely to reflect the actual activities at its business offices.[84] In its response, NYNEX states only that it plans to update its coefficients as of January 1, 1989, using a study to be performed during October 1988.[85]

48. We find it inherently implausible that worktime coefficients developed prior to divestiture could accurately reflect current service ordering processing activities, and we agree that NYNEX should not be allowed to use its existing coefficients to assign service order processing expenses to cost pools. We believe, however, that the study NYNEX states that it will be performing may yield more accurate coefficients. We require that NYNEX incorporate the results of its study into its description of its cost pool assignment method for Account 6623. In accordance with our discussion in paragraph 5, *supra*, NYNEX shall apply the new coefficients retroactively to January 1, 1988.

Account 6711 - Executive Expense and Account 6712 - Planning Expense

49. NYNEX's initial manual proposed to use the general allocator to apportion these accounts between regulated and nonregulated activities. In the *NYNEX Order*, we stated that NYNEX's method might result in inaccurate cost allocations and that we believed the costs of directly assigning or attributing portions of these accounts to be low. Therefore, we required NYNEX either to propose more cost-causational apportionment methods for these accounts or to justify in detail its proposed use of the general allocator.[86]

50. In its revised manual, NYNEX continues to propose use of the general allocator to apportion all its executive and planning expenses. In support, NYNEX states:

> The Executive and Planning expense accounts include the cost of providing overall direction to the entire telephone operating company entity. Executive expense covers the salaries and expenses of the boards of directors and all board designated officers and their secretaries and staff assistants. The nature of the functions associated with these corporate level offices is extremely broad in nature and does not lend itself reasonably to specific functions or time reporting to individual products and services.
>
> Similarly, Planning expense deals with broad, corporate type functions including the course of developing and planning long-term courses of action. The functions covered under Planning expense are not the type that can be reasonably tracked through product or service function codes or time reporting, because the functions are not product or service specific.[87]

NYNEX states further that "the unspecific and general nature" of its executive and planning expenses justify its proposed use of the general allocator.[88]

51. We find NYNEX's statements unconvincing. We believe that many functions associated with NYNEX's corporate level and planning offices are reasonably susceptible to apportionment methods that are more accurate than general allocation. While some executive and planning functions may not lend themselves to tracking through function codes or time reporting, the revised manual reflects no effort by NYNEX to identify executive and planning functions that might lend themselves to such tracking. Had there been such an effort, we believe that NYNEX would have able to identify executive and planning costs that can be directly assigned to regulated and nonregulated activities. Indeed, we discern no reason why

a carrier, such as NYNEX, that lists "planning for enhanced services and customer premises equipment" as a nonregulated activity[89] might be unable to track, with minimal effort, the direct executive and planning costs associated with that activity. Accordingly, we require that NYNEX amend its manual to establish additional dedicated regulated and dedicated nonregulated cost pools within Accounts 6711 and 6712.

52. We also believe that many of NYNEX's executive and planning costs that cannot be directly assigned can reasonably be attributed to regulated and nonregulated activities on a cost-causative basis. The costs we believe to be reasonably attributable are those incurred in supporting the broad organizational units that NYNEX has established within its telephone operating companies: plant specific operations; plant non-specific operations; marketing operations; customer services; and corporate operations.[90] We require NYNEX to amend its manual to establish cost pools within Accounts 6711 and 6712 for supporting each of these organizational units. These cost pools shall be apportioned between regulated and nonregulated activities in proportion to the combined distribution of the expenses directly assigned, directly attributed, or indirectly attributed to regulated and nonregulated activities for those operations.[91]

Account 6722 - External Relations

53. In its initial manual, NYNEX proposed to apportion cost pools for corporate advertising, public relations, investor relations, regulatory government relations using the general allocator. Since we believed that many of the costs in these pools should be directly assigned to regulated and nonregulated activities, we required that the revised manual either provide for such direct assignment or explain why it should not be mandated.[92] We also required that NYNEX use the marketing allocator to apportion those corporate advertising and public relations expenses that cannot be directly assigned.[93]

54. In its revised manual, NYNEX proposes to use the marketing allocator to apportion all the corporate advertising and investor relations expenses, and the general allocator to apportion its investor relations, regulatory government relations, and other external expenses. In support of its failure to propose the direct assignment of at least some of these expenses, NYNEX states that its "accounting records reflect cost delineation at as detailed a level as can reasonably be expected for cost pool determination" and that "[f]urther subdivisions will not identify cost pools that would require different attribution bases."[94]

55. We again find NYNEX's statements unconvincing. According to the revised manual, the external relations costs that NYNEX is proposing to apportion using the general and marketing allocators are incurred to perform functions such as disseminating publications for customers, developing information plans and other employee programs in support of service changes, and preparing and presenting tariff and service cost filings for regulatory purposes.[95] We believe that NYNEX may reasonably identify the costs of these and other external relations functions, and directly assign those costs to regulated and nonregulated activities. NYNEX shall amend its manual accordingly.

Account 6728 - Other General and Administrative Expenses

56. NYNEX's initial manual included a cost pool for compensated absences within this account and proposed that this cost pool be apportioned between regulated and nonregulated activities using the general allocator frozen at its first calculated level. In the *NYNEX Order*, we required that NYNEX either justify this apportionment factor or amend its manual to propose a new apportionment factor for this cost pool.[96] In response, NYNEX amended its cost table to state that this cost pool would be attributed to regulated and nonregulated activities "in the same proportion as the combined distribution of [its] employee wages and salaries."[97] However, the narrative portion of the revised manual states that this cost pool relates only to compensated absences earned as of January 1, 1988, and that apportioning this cost pool in proportion to "a measurement of wages and salaries, as wages and salaries on January 1988 and frozen over time is appropriate."[98]

57. We have been unable to reconcile these contradictory statements regarding the treatment of this compensated absences cost pool. We believe, however, that the method proposed in NYNEX's cost table would provide a more accurate apportionment of this cost pool than would the method proposed in the narrative portion of the manual. Therefore, we approve the method proposed in the cost table and require that NYNEX amend its narrative to specify that the apportionment factor for this cost pool will not be frozen at its first calculated level.

58. In the *NYNEX Order*, we also required NYNEX to list the separate cost pools for NYNEX Corporate, Bellcore, and other general and administrative expenses that NYNEX had stated it would create within Account 6728.[99] The revised manual lists cost pools for NYNEX charges and other general and administrative expenses, but does not list a cost pool for Bellcore charges. We believe that this omission may have been the result of an inadvertent error on NYNEX's part. Therefore, we require that NYNEX either amend its manual to include such a cost pool or explain the reasons for the omission.

III. ORDERING CLAUSES

59. According, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that NYNEX's Revised Cost Allocation Manual IS APPROVED, subject to the conditions stated in this Order.

60. IT IS FURTHER ORDERED that the revisions required herein shall be filed no later than December 31, 1988.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, CC Docket 86-111, 2 FCC Rcd 1298 (1987)(*Joint Cost Order*), *recon.*, 2 FCC Rcd 6283 (1987)(*Reconsideration Order*), *petitions for further recon. pending.*

[2] The NYNEX Telephone Companies consist of New York Telephone Company (NYT) and New England Telephone and Telegraph Company (NET).

[3] NYNEX Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 81 (1988)(*NYNEX Order*).

[4] *Id.* at 81-82, paras. 3, 7-9; *id.* at 92-93, paras. 103-04.

[5] NYNEX Revised Manual at 1.

[6] *NYNEX Order*, 3 FCC Rcd at 128, para. 2.

[7] With regard to those revisions that NYNEX claims it cannot make retroactively, we reserve the right to require retroactivity, or that subsequent adjustments be made to reflect the impact of the lack of retroactivity on 1988 operations.

[8] *NYNEX Order*, 3 FCC Rcd at 82, paras. 7-8; *see also Joint Cost Order*, 2 FCC Rcd at 1317-19, paras. 147-64.

[9] *NYNEX Order*, 3 FCC Rcd at 81-82, paras. 5-9.

[10] NYDPS Comments at 1-2; MCI Comments at 1-7.

[11] NYDPS Comments at 1-2.

[12] MCI Comments at 2-5.

[13] *Id.* at 5-7.

[14] NYNEX Reply at 1-4.

[15] *Id.* at 4.

[16] *NYNEX Order*, 3 FCC Rcd at 81-82, paras. 5-9.

[17] *See Reconsideration Order*, 2 FCC Rcd at 6305, para. 191.

[18] *See Joint Cost Order*, 2 FCC Rcd at 1355, n.390; *accord Reconsideration Order*, 2 FCC Rcd at 6305, para. 191.

[19] *Compare Joint Cost Order*, 2 FCC Rcd at 1355, n.390 (level of detail is comparable to that in Separations Manual, not that in the former Division of Revenues procedures).

[20] *See Joint Cost Order*, 2 FCC Rcd at 1333, para. 274.

[21] *Id.* at 1328-29, para. 242; *id.* at 1334, para. 283.

[22] *See id.* at 1333, para. 274.

[23] Incidental treatment causes an activity's costs and revenues to be apportioned to regulated activities, even though the activity would normally be classified as a nonregulated activity.

[24] *NYNEX Order*, 3 FCC Rcd at 83, para. 15.

[25] NYNEX Revised Manual at 37.

[26] *Id.*

[27] *Id.*

[28] *See* 47 C.F.R. §32.23(a); *Joint Cost Order*, 2 FCC Rcd at 1308, paras. 76-78.

[29] *Joint Cost Order*, 2 FCC Rcd at 1308, paras. 77-78.

[30] *NYNEX Order*, 3 FCC Rcd 84, para. 23.

[31] *Id.* at 94, n.37.

[32] NYNEX Revised Manual at 56.

[33] 2 FCC Rcd at 6297.

[34] NYNEX Reply at 5.

[35] 47 C.F.R. §32.27(d).

[36] *Id.*

[37] *See Reconsideration Order*, 2 FCC Rcd at 6296-97, paras. 123, 130-31; *Joint Cost Order*, 2 FCC Rcd at 1336, para. 299.

[38] NYDPS Comments at 4.

[39] NYNEX Reply at 6.

[40] 47 C.F.R. §32.27(b).

[41] *See id.*

[42] *See* para. 19, *supra*.

[43] 47 C.F.R. §32.27(d).

[44] 47 C.F.R. §64.901.

[45] *Joint Cost Order*, 2 FCC Rcd at 1329, para. 242; *id.* at 1334, para. 283.

[46] NYNEX Revised Manual at 61.

[47] NYDPS Comments at 6.

[48] NYNEX Reply at 6 n.8.

[49] 47 C.F.R. §32.27(a).

[50] 2 FCC Rcd at 6297, para. 132.

[51] NYNEX Revised Manual at 61.

[52] *See* 47 C.F.R. §32.27(c).

[53] *NYNEX Order*, 3 FCC Rcd at 83, para. 20.

[54] NYNEX Revised Manual at 44.

[55] *See* 47 C.F.R. §§32.27(d); 64.901(b)(3)(iii).

[56] *NYNEX Order*, 3 FCC Rcd at 84, para. 30.

[57] NYNEX Revised Manual at 64.

[58] *Id.*

[59] *See* para. 19, *supra*.

[60] NYNEX Initial Manual at 94.

[61] *NYNEX Order*, 3 FCC Rcd at 85, para. 37.

[62] NYNEX Revised Manual at 155.

[63] *Id.*

[64] *NYNEX Order*, 3 FCC Rcd at 85, para. 37.

[65] *Id.* at 85, para. 38.

[66] NYNEX Revised Manual at 153.

[67] *Id.* at 103-06.

[68] *Id.*

[69] *NYNEX Order*, 3 FCC Rcd at 89, para. 68.

[70] NYNEX Revised Manual at 109.

[71] *Id.* at 75.

[72] *NYNEX Order*, 3 FCC Rcd at 89-90, para. 73.

[73] *Id.* at 89-90, paras. 72-73.

[74] NYNEX Revised Manual at 79.

[75] *Id.* at 73.

[76] *Id.*

[77] *Id.* at 125.

[78] *NYNEX Order*, 3 FCC Rcd at 88, para. 65.

[79] *Id.* at 90, para. 79.

[80] NYNEX Revised Manual at 125-26.

[81] *Id.* at 87.

[82] *Id.*

[83] *Id.*

[84] NYDPS Comments at 5-6.

[85] NYNEX Reply at 6.

[86] *NYNEX Order*, 3 FCC Rcd at 91, para. 88.

[87] NYNEX Revised Manual at 97-98.

[88] *Id.* at 98.

[89] *Id. at 7.*

[90] *See id.* at 154.

[91] The apportionment methods are similar to the methods we have approved for other carriers. *See, e.g.*, BellSouth Corporation's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 128 (1988) (*BellSouth Order*).

[92] *NYNEX Order*, 3 FCC Rcd at 91, para. 88.
[93] *Id.* at 91, para. 89.
[94] NYNEX Revised Manual at 88.
[95] *Id.* at 89-90.
[96] *NYNEX Order*, 3 FCC Rcd at 92, para. 96.
[97] NYNEX Revised Manual at 103.
[98] *Id.* at 97.
[99] *NYNEX Order*, 3 FCC Rcd at 91-92, paras. 93-96.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 86-285

In the Matter

Establishment of a Fee Collection
Program to Implement the Provisions
of the Consolidated Omnibus Budget
Reconciliation Act of 1985

MEMORANDUM OPINION AND ORDER

Adopted: September 22, 1988; Released: October 11, 1988

By the Commission:

1. The Commission has before it for consideration two formal petitions for reconsideration, filed by "Brown and Schwaninger" (B&S) and "Keller and Heckman" (K&H) relating to our *Report and Order* in this proceeding. *Establishment of a Fee Collection Program (Fee Program)*, 2 FCC Rcd 947 (1987). Pleadings responsive to the formal petitions were submitted by the Manufacturers Radio Frequency Advisory Committee (MRFAC), the Utilities Telecommunications Council (UTC), and the American Petroleum Institute (API).

2. In addition, interested parties have submitted comments addressing issues that were not raised in the petitions for reconsideration or responsive pleadings, and various parties have sought generic changes in the *Fee Program* in requests for declaratory rulings, fee waivers, refunds, and general correspondence. Moreover, our own experiences administering the collection of fees for the past year has indicated the need for some adjustments in the *Fee Program*. Accordingly, we will take this opportunity to address a variety of issues, raised in the petitions for reconsideration and elsewhere.

BACKGROUND

3. In 1986, Congress authorized the collection of fees by the Commission. Consolidated Omnibus Budget Reconciliation Act of 1985, 47 U.S.C. § 158, Pub. L. No. 99-272, §§ 5002(e) and (f), 100 Stat. 82, 118-121 (1986). The legislative history may be found in the Conference Report to accompany H.R. 3128, H.R. Rep. No. 453, 99th Cong., 1st Sess. 39-42, 423-434 (1985) (hereinafter "Conference Report"). The rules and procedures to implement this program were adopted after an opportunity for public input and internal study to insure the most appropriate method of fee collection and cash management. Throughout this proceeding the Commission has been guided by three distinct principles: (1) fee collections should not have an adverse impact on the Commission's application processing and equipment authorization programs; (2) fees should be collected and deposited in the most cost effective manner possible; and (3) fees should impose little or no additional paperwork burden on the public.

4. The issues to be treated herein may be grouped under two general headings: questions of the appropriate fee; and the method of fee payment. Under the first heading, we will deal with: (A) fees for untimely applications; (B) fees for applications that are resubmitted after dismissal by staff action; (C) fees for applications necessitated by rule changes; (D) fee exemptions for applicants proposing a noncommercial educational service; (E) the appropriate fee, if any, for petitions requesting "significantly viewed" status under section 76.54 (47 C.F.R. § 76.54); (F) the applicability of the mass media hearing charge in cases where only one applicant is prosecuting its application; and (G) the appropriate fee, if any, for an extension of time within which to consummate a sale in the common carrier services. Under the second heading, we will deal with: (A) the requirement for a full and proper fee payment; (B) the requirement that fees be paid with only one instrument of payment; (C) fee payments with foreign currency or with checks on foreign banks; (D) the processing of fee payments and bank errors; (E) the availability of receipts for fee payments; and (F) the submission of fees by frequency coordinators in the private radio services.

DISCUSSION

I. Questions of the Appropriate Fee

5. As a preliminary matter, we note that, in a number of situations, parties have opined that a given fee in no way reflects the amount of actual effort expended by the Commission on a particular application or type of application. In this regard, it is important for the public to understand that the amount of the fee represents the Commission's estimate, accepted by Congress, on the *average* cost to the Commission of providing the service. Conference Report at 423. As an average, there will be individual situations in which the actual cost may be more or less. It is not our intention to make individualized determinations of the "appropriate fee." Rather, except in unusual cases in which the public interest requires otherwise, we will levy the fee as determined by Congress. *See* 47 U.S.C. § 158(d)(2); 47 C.F.R. § 1.1115. We also understand that the cost of the Commission's processes may change with changes in the statute or the Commission's rules. It is therefore our intention to continue to monitor the processing costs of our regulatory services and to make appropriate legislative suggestions so that the fees may continue reasonably to reflect the actual average cost of Commission action on the matter subject to the fee.

A. Applications that are not timely filed.

6. We originally concluded that fees would be retained by the government irrespective of the substantive disposition of the application. Therefore, if an application was found to have been submitted with a sufficient fee payment, its subsequent dismissal for any other reason would not result in a fee refund. *See* 47 C.F.R. § 1.1111. This conclusion was based on the fact that the Commission incurs a processing cost regardless of the ultimate disposition of the application. Moreover, in any particular case, a determination based on the actual costs incurred in the processing of an application would unduly burden the administration of the fee program.

7. In a request for a fee refund, Randal J. Miller noted that he had filed an application for a new FM station before the Commission opened a "window" for the channel for which he applied. *See* 47 C.F.R. § 73.3564(d).[1] His application was therefore dismissed.

8. Although such filing errors are clearly within the the control of the applicant, we are concerned that some untimely applicants may not have suffered the loss of their filing fee. In establishing procedures for the filing of some applications in "windows" at the Mellon Bank in Pittsburgh, the bank creates a filing box that is only open during the filing window. Applications reaching the filing box before a window opens or after it closes are not accepted by the bank, and they are returned unopened. Thus, where the untimely window filing is made to the bank, the fee is returned, but when the untimely filing is made directly to the Commission, the fee is retained.

9. We are unwilling to alter the method by which the bank handles window applications, but we are equally unwilling to preserve a regime in which fees are treated differently depending on where the application is filed. Accordingly, to resolve this conflict, we believe that the appropriate course would be to refund the filing fees for applications for new facilities that are filed in response to filing windows established by the Commission.

B. Applications refiled after staff dismissal.

10. K&H propose that, when an application is dismissed at any time following the fee review process, the applicant should be permitted to refile within 30 days without a fee. At a minimum, K&H suggests that the Commission permit refiling without a fee if an application is rejected for minor errors or omissions prior to detailed technical review. K&H argues that this practice would be fairer to applicants because the Commission's staff has the discretion to either dismiss applications or request further information. The latter action would not require an additional fee. They also note that this change would not impact upon the Commission's goal of recovering its costs of processing as these applications, if resubmitted, would continue in the processing chain without need for preliminary review.

11. As a general matter, it is impossible to state that the processing of a resubmitted application would merely take up where the processing of the first application left off. Indeed, the very filing of the resubmitted application results in additional costs to the Commission. Thus, we find no appropriate basis upon which to forego the fee for the resubmitted application.

C. Fees for applications required by rule changes.

12. Section 1.1111(a)(4) provides that the Commission will refund filing fees paid by applicants where a new rule, law, or treaty would render a pending application useless. 47 C.F.R. § 1.1111(a)(4). Similarly, section 1.1112 creates a fee exemption for applications filed for the sole purpose of amending or modifying a pending application to comply with new rules. 47 C.F.R. § 1.1112(a). However, the rules do not specifically exempt applications filed in the first instance for the sole purpose of complying with a new Commission requirement. We believe this is an oversight, and we will amend section 1.1112(a) to exempt applications filed for the sole purpose of complying with a rule change.[2] However, this exemption will not be available to FM and TV licensees or permittees that are applying for an upgraded channel after a Rule Making. We strongly urge that applicants filing under this or any other exemption where a fee payment is ordinarily required indicate in a cover letter that a fee is not enclosed and explain the basis for a fee exemption. In the absence of such explanation, there exists the possibility that the fee processing staff will assume that a required fee was omitted and dismiss the application. While reconsideration of such actions will be available, the process will only serve to delay action on the underlying application and needlessly consume Commission resources.

D. Exemption for noncommercial educational applicants.

13. In a pleading entitled "Comments," Rural Television Service (RTS) requests that its members and affiliates should be exempt from fees in connection with their applications to provide noncommercial educational service by low power television stations that would broadcast the programming of the Public Broadcasting Service to areas otherwise without such service. RTS argues that Congress did not intend to exact fees for applications to provide a noncommercial educational service.

14. Section 8 of the Communications Act provides a schedule of fees for, *inter alia*, " *Commercial* Television Stations," " *Commercial* Radio Stations," and "FM/TV Translators and LPTV stations." 47 U.S.C. § 158 (emphasis supplied). Thus, Congress did not enact fees for noncommercial educational television and radio stations, but, the absence of the limiting term "commercial" from the fee schedule for "FM/TV Translators and LPTV Stations" implies that it did not provide a similar explicit exclusion for noncommercial educational LPTV stations. The legislative history of section 8 indicates that "non-commercial radio and television stations will not be subject to any of the fees listed in this schedule." Conference Report at 423. While Congress specifically mentioned the exemption for noncommercial educational television and radio stations (Conference Report at 425 and 426), no similar exemption was discussed for LPTV or translator stations. Conference Report at 427.

15. Nor did the *Fee Program* generally exempt translator and LPTV applications that propose a noncommercial educational service. The Commission recognized that these services are singularly free to abandon a noncommercial educational service. Thus, a general fee exemption could be subject to abuse. However, where a translator or LPTV application was filed by the licensee of a conventional noncommercial educational radio or TV station that would operate the translator or LPTV station as a noncommercial educational facility, the translator or LPTV application was exempted from any fees. *See* 47 C.F.R. § 1.1112(c) and (d).

16. We believe that the congressional exemption for noncommercial educational applicants was intended to enhance the financial support for these services beyond that provided by the Corporation for Public Broadcasting and National Telecommunications and Information Administration (NTIA) facilities grants. Indeed, exacting fees from noncommercial educational applicants would dilute the financial support offered by Congress. In this regard, the weight of that policy bears equally on applicants for full power noncommercial educational stations and on translator or LPTV applicants that propose to operate as noncommercial educational stations and are constructed with NTIA grants.

17. However, in recognition of the ability of LPTV stations to change from noncommercial to commercial operation without notifying the Commission, we do not believe that Congress intended to provide LPTV stations with a general exemption whereby any and all applicants could avoid payment of fees. Rather, we can effectuate the congressional policy of promoting the noncommercial educational service by exempting noncommercial educational translator and LPTV applicants from the fees only after they obtain a facilities grant from NTIA. The NTIA grants impose financial obligations on a permittee to continue its noncommercial educational service or return the funds thereby obtained.

18. In practice, we will require the initial payment of all applicable fees by LPTV and translator applicants that propose a noncommercial educational service and are not otherwise exempt from fees, but those payments will be refunded upon notification by the applicant that it has obtained NTIA funding. As NTIA facilities grants are made only to permittees, this exemption will only be available to a successful applicant. However, once an applicant has obtained NTIA funding for one such station, and as long as it continues to operate that station as a noncommercial educational facility, the applicant will be exempt from all future fees associated with that station. LPTV permittees that do not seek NTIA facilities grants, or that do not receive such grants for reasons other than the permittees' eligibility or the nature of the service to be provided, may also be entitled to a fee refund. In such cases, after grant, the permittee should submit request for a fee refund to the Commission. A refund will be appropriate where that request demonstrates that the permittee complies with the eligibility and service requirements of section 73.621 of our rules. A refund granted under these circumstances will have the same affect as a refund granted on the basis of NTIA funding. However, the request will constitute a commitment by the station to maintain its eligibility and provide a noncommercial educational service through the ensuing license term. If during that time the station desires to change to a commercial operation, it may do so upon payment of the fees refunded or waived.

19. In a similar vein, the Association for Higher Education of North Texas (AHE) seeks a determination that it is exempt from filing fees as a noncommercial educational licensee. AHE is composed of colleges and universities in the Dallas-Fort Worth area, and it is the licensee of an Instructional Television Fixed Service (ITFS) system. Although there are no fees for ITFS applications, AHE requests an exemption for applications for microwave facilities to serve its ITFS system.

20. ITFS is an "instructional" service rather than a "noncommercial educational" service. Compare 47 C.F.R. § 74.931(a) (defining an instructional service) and 47 C.F.R. § 73.621 (defining a noncommercial educational television station). Thus, under our present rules, ITFS licensees are not exempt from fees that may be applicable to applications for auxiliary or interconnection facilities used in conjunction with the ITFS system. *See* 47 C.F.R. § 1.1112(c)-(e). However, we believe that there is much to be gained and little to be lost in providing an exemption for ITFS licensees like AHE when they apply for interconnection facilities to be used in providing their instructional service. ITFS licensees are accredited educational institutions or governmental organizations engaged in formal education or non profit educational organizations. 47 C.F.R. § 74.932(a). Accordingly, we will amend section 1.1112 of the rules to include a fee exemption for ITFS licensees applying for communications facilities to be used in conjunction with the instructional system.[3]

E. "Significantly Viewed" petitions.

21. The Law Firm of Crowell & Moring filed a "Motion for Declaratory Ruling," concerning the applicability of a700 filing fee to petitions by television stations seeking "significantly viewed" status under 47 C.F.R. § 76.56. The Association of Independent Television Stations, Inc. supported the suggestion that the filing fee should not be applicable to petitions requesting significantly viewed status.

22. Section 158 provides for a700 fee for "Cable Special Relief Petitions." 47 U.S.C. § 158(a). Although the statute does not define "Special Relief Petitions," the legislative history does:

> *Cable Special Relief Petitions*. Filing fees for petitions . . . seeking waiver of any provision of the rules relating to cable television systems, or the imposition of additional or different requirements, or the issuance of a ruling on a complaint or disputed question.

Conference Report at 428. Our *Notice of Proposed Rule Making in Docket 86 - 285 (Fee Program NPRM)*, 51 Fed. Reg. 25792, 25808 (July 16, 1986), included petitions seeking significantly viewed status as "special relief petitions" subject to the fee. However, when the Commission adopted the rules implementing the fee program, we limited application of the700 special relief fee to:

> Those petitioning under Section 76.7 of the rules that are seeking an *exemption from the requirements of the cable television rules or that seek the imposition of special requirements beyond those provided for in the rules*.

Fee Program, 2 FCC Rcd at 970-71 (1987) (emphasis supplied).

23. Section 76.54 of the Commission's rules sets forth the procedures to be followed by broadcast stations that wish to be considered significantly viewed in a cable television community. 47 C.F.R. § 76.54. A petition requesting significantly viewed status does not request a waiver of the Commission's rules nor the imposition of additional or different requirements. It merely submits the showings required by the rules and requests the significantly viewed status as provided for in the rules. Thus, such petitions do not request "special relief" and they are not filed under Section 76.7. In such circumstances, "significantly viewed" petitions which offer the showings as required in Section 76.54 are not "special relief" petitions within the definition in the Conference Report.[4] Thus, such petitions should not be subject to the700 filing fee for "Cable Special Relief Petitions."

F. The hearing fee in noncomparative cases.

24. The fee legislation includes a hearing charge of6,000 for applicants in the Mass Media services. 47 U.S.C. § 158. The legislative history of that provision defines the "Hearing Charge" as "[t]he charge levied when an applica-

tion is designated for hearing." Conference Report at 427. However, the Commission determined that the fee should not apply to "enforcement actions," because its imposition would require a party to pay a fee to defend itself. *Fee Program*, 2 FCC Rcd at 966. We also determined that submission of the fee with the filing of the Notice of Appearance would be the "most efficient means to collect the fee." *Fee Program*, 2 FCC Rcd at 966; *see also* 47 C.F.R. § 1.221(f). This delay in the payment of the fee also permits applicants to negotiate and file a settlement agreement. Because such settlements conserve Commission resources and expedite the provision of new service, we determined that no hearing fee would be due in cases where settlement agreements were filed by the Notice of Appearance deadline. *Id.*

25. Since the adoption of the *Fee Program*, we have encountered instances in which cases designated as comparative proceedings become noncomparative in nature. The instances include situations in which only one of the designated applicants files a Notice of Appearance,[5] as well as settlement cases in which the surviving applicant must resolve a basic qualifying issue before it can be granted.[6] In either situation, the case is neither a comparative proceeding nor an enforcement action. We have withheld action on requests for fee waivers and refunds in these cases pending our consideration of the matter here.

26. As indicated above, the fee legislation is broad enough to support the imposition of hearing fees in these circumstances. Moreover, although the hearing fee imposed in section 1.1104 is limited to "comparative proceedings," that term was used to distinguish "enforcement actions," which would not be subject to hearing fee. 47 C.F.R. § 1.1104 n.23; *Fee Program*, 2 FCC Rcd at 966. Further, in determining the average cost of hearings, we divided the total cost of our adjudicative processes for a year by the total number of applicants designated for hearing in that year. Thus, applicants like G & D and Van Veghten were "counted" in our determination of the "average" cost of hearings.

27. Nevertheless, the imposition of a6,000 charge in cases which require no evidentiary process does appear to be fundamentally unfair. Thus, in cases designated as comparative proceedings where only one applicant survives the Notice of Appearance deadline, and, by virtue of the dismissal of the other applicants, the surviving applicant is immediately grantable, no hearing fee will be assessed. In cases where a settlement agreement obviates the evidentiary process, no hearing fee would have been due. *Fee Program*, 2 FCC Rcd at 966. In cases where the process is not needed because only one applicant paid the fee with its Notice of Appearance, that payment will be refunded upon request.

28. However, in all cases designated as comparative proceedings where only one applicant survives the Notice of Appearance deadline, and that applicant is not immediately grantable, we will require the payment of the hearing fee. The fee may be refunded if the applicant can be granted without a decision on the merits, but it will be retained in cases where the Commission's evidentiary processes must be utilized to resolve any outstanding matters. Outstanding matters which preclude an immediate grant of the sole surviving applicant include issues specified against the applicant or "directives" which generally note some flaw in the application and direct the applicant to cure the defect by an amendment filed after designation for hearing. The presiding judge is empowered to review the amendment and determine whether the defect has been cured or an issue should be added to further explore the matter.

29. A decision by a presiding judge that deletes all outstanding issue(s) pursuant to a request filed under section 1.229, is not a decision on the merits. 47 C.F.R. § 1.229; see also *Belo Broadcasting Corp.*, 68 FCC 2d 1313, 1328 (1978) (deletion available only in unusual circumstances); *D. H. Overmyer Communications Co.*, 2 FCC 2d 521 (Rev. Bd. 1966) (deletion appropriate where information before the Commission at the time of designation obviates the issue); *Viking Television, Inc.*, 16 FCC 2d 1015, 1016 (Rev. Bd. 1969) (deletion generally not available on the basis of post-designation amendments). For purposes of determining whether the hearing fee should be retained by the Commission, we intend that presiding judges entertain requests to delete directives in the same manner as petitions to delete issues, where such directives or issues were erroneously designated. If an applicant is granted after a decision deleting issues and/or directives, it will be entitled to a refund of its hearing fee upon request.

30. On the other hand, where the directives and/or issues cannot be deleted, they must be resolved on the basis of post-designation amendments and/or evidentiary submissions. In either case, the presiding judge's decision would be on the merits. In our view, a grant by a decision on the merits warrants retention of the hearing fee. We recognize that the grant may be by summary decision, and we anticipate that some applicants may assert that the Commission does not incur costs of6,000 in that process. However, as previously noted, the fees represent the average cost of our hearing process. Moreover, in most cases, the issue or directive is specified as a result of some defect in the application that the applicant could have dealt with prior to designation for hearing. Thus, applicants are generally in a position to avoid the designation of many issues and directives. In these circumstances, where the issue(s) and or directive(s) must be resolved on the merits, we believe that it is reasonable to impose a hearing fee.[7]

31. In any case designated as a comparative hearing that becomes a one-applicant proceeding by virtue of a timely-filed settlement or the failure of applicants to file Notices of Appearance, and the sole surviving applicant is not immediately grantable, the presiding judge should be satisfied that the surviving applicant has paid its hearing fee. Thereafter, if the presiding judge decides that deletion of all issues and/or directives is warranted, a copy of that decision can be submitted to the Fee Section along with the applicant's request for a refund of the hearing fee.

G. Extensions of time to consumate a sale.

32. In several situations involving the sale of earth station licenses, applicants have found it necessary to request extensions of time within which to consumate a previously approved transaction. The staff took the position that the requests were subject to the90 fee for "All Other Applications" in section 1.1105. However, the legislative history of 47 U.S.C. § 158 indicates that those "Other Applications" refer to "application[s] for regular or temporary authorization, including, but not limited to, modification or renewal of station authorizations, temporary authorizations or waivers, and transfers and assignments." The request for an extension of time within which to consummate a transaction is not a station authorization, a temporary authorization, or a waiver. Nor is it an ap-

plication for transfer or assignment. Thus, it does not appear that Congress intended to levy a fee for these requests, and no fee will be assessed.

II. Method of Payment

33. Initially, the K&H Petition for Reconsideration noted that the *Fee Program* established filing locations for applications subject to fees, but other provisions of the Commission's rules contained contradictory filing information. Although many of those inconsistencies have been corrected in our *Supplemental Order*, 2 FCC Rcd 1882 (1987), it remains necessary to amend section 0.401 of our rules to clarify the proper location for the filing of certain applications in the Mass Media Services, and we will do so in the rule amendments appended hereto.

A. Full and proper payment of fees.

34. We take this opportunity to re-emphasize that full and proper fee payments must accompany applications or filings at the time of their submission to the Commission. 47 U.S.C. § 158(c)(2). Thus, the remittance must be for the full amount of the fee as set forth in our rules; the form of payment must comply with our rules (47 C.F.R. § 1.1108), and the payment (if a check, bank draft or money order) must be collectible. An application received without a full and proper fee will be considered insufficient for processing, and it will be returned to the applicant. Accordingly, we will modify section 1.1107(b) to make it clear that filings will be dismissed where the full fee is not included, the fee is paid in an improper manner, or the payment medium is not collectible.

35. Where a fee payment has failed and the applicant seeks reconsideration and/or review of the fee determination and re-instatement of the application, our rules do not presently specify whether the requisite fee payment must accompany the request. In some instances, applicants have availed themselves of the payment options in section 1.1115(c) pertaining to requests for fee waivers. 47 C.F.R. § 1.1115(c). However, in cases involving reconsideration or review of staff fee decisions, the failure to include the full and proper payment along with the request can needlessly delay the Commission's processes and increase the paperwork burden on the Commission's staff. For example, in a case where reinstatement of the application would be warranted, but the applicant opted not to include the requisite fee with the request, the proceeding would be delayed while the Commission billed the applicant for the fee and gave it an appropriate time to remit payment.

36. The time consumed by the billing process is particularly troublesome in cases involving mutually exclusive applications or the mass media hearing charge, where a lottery or comparative hearing would be delayed thereby. Accordingly, we are amending section 1.1116 of our rules to specify that applicants requesting reconsideration or review of staff decisions to dismiss an application for a failed fee must submit the full and proper fee with such request, and failure to do so will result in the dismissal of the request.

37. Prior to the discovery of a fee defect by the staff. the *Fee Program* noted that applicants that believe they have made an insufficient fee payment can resubmit the full and proper fee with the application attached. In such cases, the original payment is refunded. Our decision to accept corrected fees has apparently resulted in some confusion, and we take this opportunity to clarify the matter.

38. When an applicant resubmits a fee, it must submit the entire correct payment along with the application for which the fee is submitted. The staff will not accept payments that must be matched with previously submitted applications or partial payments to correct earlier insufficient fees. Given the number of applications the Commission handles, the "matching" of supplemental payments with earlier filed applications or incomplete payments would be an administrative nightmare.

39. In any situation in which an applicant avails itself of the opportunity to correct an insufficient or failed fee payment, the filing date of the corrected, sufficient fee shall be considered the filing date of the application. Thus, in cases where an application must be submitted by a filing deadline, the "corrected" fee and resubmitted application must be received on or before the established deadline in order to be considered timely filed. We are amending section 1.1114(a) to make this explicit. As indicated at ¶ 9 above, certain untimely applications will be returned with the fee submission.

B. The "one instrument" rule.

40. Section 1.1108(b) requires that fee payments be made with " *one* check, bank draft or money order with each application." 47 C.F.R. § 1.1108(b) (emphasis supplied). We adopted the "one instrument" rule to ease the administrative burden of tracking payment instruments to ensure that they were in fact collected. *Fee Program*, 2 FCC Rcd at 955. However, Cecil Lynch, an informal commenter, suggests that applicants be permitted to make payment with more than one money order. He asserts that there are limits on the amount for which single money order can be written, and those maximums may be lower than the amount of the required fee. Mr. Lynch argues that the one instrument requirement penalizes rural applicants who may keep their finances on a cash basis and have ready access to a post office, but not a bank.[8] Mr. Lynch contends that this barrier arbitrarily precludes methods of payment that he believes are entitled to a greater degree of confidence than, for example, personal checks.[9]

41. We recognize the importance of money orders as a means of payment for persons without checking accounts or regular access to a bank. Thus, in situations in which the fee exceeds the money order limit, where the applicant has neither a checking account nor access to a bank, and the use of multiple money orders is the only practical method available for remitting the fee, we will accept fee payments using multiple money orders.

42. In informal comments, Fletcher, Heald & Hildreth (FHH) proposes that two payment instruments be permitted in the case of assignment and transfer applications. It argues that the seller and the buyer are separate applicants, each responsible for a different portion of the application. FHH also points out that the Commission permitted separate payments for the buyer and seller in our earlier fee program. Further, FHH requests clarification as to whether the assignment of an AM/FM combination, when submitted on one application, requires one or two checks and whether multiple applications for auxiliary services filed for one applicant requires one or multiple checks.

43. We can find no public interest benefit to the FHH proposal that we permit two fee checks in assignment or transfer cases. Where two checks are submitted, the Commission's tracking and record keeping efforts would be doubled. The proposal would also double the chances of a failed payment, with the consequent delays and administrative costs. Unlike the case of money orders discussed above, FHH alleges no recognizable hardship on the applicants. In response to FHH's queries, we would permit the filing of a single fee check for the assignment or transfer of an AM/FM radio station combination. Such sales may be applied for on a single form; they involve the same legal applicant, and request the same authorization in the same radio service. 47 C.F.R. §§ 1.1104 and 1.1108(b)(1); *Fee Program*, 2 FCC Rcd at 983 n.50. Similarly, an applicant may submit a single check to cover all simultaneously filed applications for auxiliaries. *See* 47 C.F.R. § 1108(b).

C. Foreign currency and foreign checks.

44. Section 1.1108(a) provides that fee payments should be "denominated in U.S. dollars and deposited in United States financial institutions." 47 C.F.R. § 1.1108(a). We are aware that some applicants may be based abroad, and the quoted language may impose certain difficulties in the payment of the required fees. In this regard, the Convention on the Organization for Economic Co-operation and Development (OECD), December 14, 1960, 12 U.S.T. 1728, T.I.A.S. No. 4891, provides, in part, that the United States and other signatories will "pursue their efforts to reduce or abolish obstacles to the exchange of goods and services and current payments and maintain and extend the liberalization of capital movements." OECD, *supra*, art. 2, para. 3, 12 U.S.T. at 1733. Although the provisions of section 1.1108 do not constitute such "obstacles," the policy enunciated in OECD obliges us to carefully review the rule to determine whether its limitations on foreign, non-resident applicants are justified.

45. The requirement that fees be paid in "U.S. dollars" avoids the need to determine whether payments denominated in foreign currencies are sufficient on the basis of the current rate of exchange. Such deteminations would impose significant administrative costs on the Commission. Moreover, we note that the United States Customs Service requires payment of Customs duties, taxes and other charges in United States currency. 19 C.F.R. § 24.1(a). Accordingly, we do not believe that the requirement that fees be paid in United States currency constitutes an unreasonable obstacle to foreign filers.

46. The requirement that the funds for payment of the fee by check, bank draft or money order be "deposited in a United States financial institution" permits fee payments with foreign checks or bank drafts that indicate a corresponding domestic bank for collection. Similarly, we permit payments with international money orders, denominated in U.S. dollars, that are payable through a U.S. bank. Other foreign checks, bank drafts or money orders would generally delay payment to the Treasury for up to 21 days, and they are often subject to bank processing fees that are deducted from the face amount of the check.[10] The resulting underpayment of fees would be extremely difficult to track and expensive to remedy. Moreover, we note that the Customs Service will not accept checks drawn on foreign banks. 19 C.F.R. § 24.1(c). Accordingly, we will continue to require that any fee payments submitted by checks, bank drafts or money orders written on foreign banks should indicate that the funds are "deposited in U.S. financial institutions" identified on the payment instrument.

D. Fee processing and bank errors.

47. The *Fee Program* indicated that the Commission's depository bank would present "all instruments to the drawer's bank twice before returning the instrument to the Commission as an uncollectible item." 2 FCC Rcd at 957. Since then, we have had a case in which a check was returned with the notation "Account Closed." Operating under normal banking practices, our bank did not submit the check for payment a second time. The applicant was dismissed, but, in view of the quoted language, reconsideration was granted.

48. We wish to take this opportunity to clarify the manner in which our bank will handle fee submissions. The *Fee Program* intended to reflect the normal manner in which checks are cleared by banks. Generally, checks returned for insufficient or uncollected funds are presented a second time. That is not the case for checks that are returned because the account has been closed or payment has been stopped. Our depository bank will operate under normal banking procedures. It will not take any special steps to negotiate fee payment checks, and checks that are returned for a closed account or stopped payment will not be submitted a second time.

49. However, where a payment is dishonored due to a bank error, we will consider a request to reinstate the application with a substitute payment. Although the *Fee Program* indicated that the ultimate responsibility for the payment of fees rests with the applicant (2 FCC Rcd at 957), dismissal of an application because of a bank error may be an unduly harsh result, and an applicant could be left without a suitable remedy. Accordingly, upon request, we will reinstate previously dismissed applications based on a convincing showing, including a statement by the bank, that the failure to honor the check was entirely due to an error on the part of the bank.[11] These requests for reinstatement will be handled in accordance with the procedures established in 47 C.F.R. § 1.1116(b).

E. Receipts for Fee submissions.

50. We previously determined that we would not provide receipts for fee submissions. *Fee Program*, 2 FCC Rcd at 950. However, we indicated that we would continue to date stamp copies of applications as they are filed when provided with a copy for that purpose. In their "Petition for Reconsideration and Request for Clarification," K&H requests that we modify section 1.1108 to reflect these procedures. Generally, the commenters believe that some evidence of the filing of an application with a fee payment instrument is desirable.

51. We continue to believe that providing separate receipts for fee submissions would be administratively impractical. However, we will amend section 1.1108 of our rules to reflect the availability of a date stamped copy of the filing. The date stamped copy would satisfy the concerns of those that file on behalf of others by providing a record of the filing.

52. However, to clarify our statement in the *Fee Program*, 2 FCC Rcd at 981 n.19, the date stamped copy of the application would not provide presumptive evidence that a fee payment was included. Rather, the Commission's Fee Section and the Mellon Bank routinely date

stamp applications for which no fee is provided. Thus, as a practical matter, the date stamp does not establish that a fee was submitted with the application. If any dispute arises as to whether an application was tendered with a fee instrument, additional supporting documentation would be required. Such documentation could include, for example, a transmittal letter indicating that the application and fee instrument were attached and a copy of the fee payment instrument. However, in cases where the Commission has no record of a fee instrument, only a cancelled check or similar evidence that the fee instrument was cashed would establish that the fee was actually paid.

F. The role of frequency coordinators.

53. In 1986, the Commission adopted a frequency coordination procedure for certain Private Land Mobile Radio Services. *Frequency Coordination in the Private Land Mobile Services*, 103 FCC 2d 1093 (1986). We therein determined that the frequency coordinator would file the coordinated application with the Commission. 47 C.F.R. § 1.912. The adaptation of fee payments to the frequency coordination procedure was the subject of substantial comment and discussion in this proceeding. *See Fee Program*, 2 FCC Rcd at 952-53. After considering a number of options, we determined that frequency coordinators should forward an applicant's fee payment to the Commission when they filed the application. When an application is submitted for coordination, the applicant may enclose a fee check, made out to the Commission. The check would be held until coordination was completed, and then it would be filed with the application. In the alternative, an applicant may await the completion of coordination before sending the fee to the coordinator to be filed with the application. *Fee Program*, 2 FCC Rcd at 953.

54. In its "Petition for Reconsideration," B&S asks that the Commission remove coordinators from the fee collection process and require that applications be returned to the applicant for filing with the Commission. To the extent that B&S attacks the filing procedure adopted in *Frequency Coordination*, *supra*, their pleading will be dismissed as a late filed petition for reconsideration of that decision. *See* 47 C.F.R. § 1.429(d). We will not, at this late date, revisit the determinations made therein, including, for example, the decision that frequency coordinators would file the coordinated applications with the Commission. However, we will consider those portions of the B&S "Petition for Reconsideration" that address the submission of fees.

55. B&S believes that it is necessary to establish the legal relationship between the applicant, frequency coordinator and the Commission so that an applicant can know the duty owed to it by the coordinator and the remedies available to it should a coordinator mishandle an application or fee. As an example, B&S posits a case in which a frequency coordinator recommends a frequency other than the one requested by the applicant. If that frequency were of no value to the applicant, and the coordinator nevertheless forwarded the application and fee to the Commission, the applicant would have "wasted" the fee payment.

56. In opposition, MRFAC and API note that applicants may avoid "wasting" a filing fee by not including the fee until they have learned the results of coordination. MRFAC also suggests that we make the choices available to the applicant explicit. UTC argues that coordinators are not handling fees outside of their statutory authority, but they simply forward applications, with fee checks attached, to the Commission. UTC also states that the Commission has established standards of care for coordinators and remedies for applicants. API believes that there is no agency relationship between the coordinator and applicant unless they explicitly establish one.

57. In reply, B&S asserts that the authority granted by Congress in 47 U.S.C. § 332(b)(1) cannot be read as broad enough to include authority to utilize frequency coordinators to handle fee payments.[12] It claims that the oppositions of API and UTC indicate that there is some confusion as to the relationship between the coordinator and the applicant, and the *Fee Program* is unclear as to whether a frequency coordinator is required to communicate the results of its coordination when it contacts an applicant who has not yet paid the fee. B&S claims that, in its experience, none of the coordinators have provided this information.

58. Initially, we believe that the role assigned to frequency coordinators in filing applications subject to fees is within the mandate of 47 U.S.C. § 332(b)(1) to "utilize" frequency coordinators. The *Fee Program* made it abundantly clear that the frequency coordinator is not serving as a collection agent for the government. 2 FCC Rcd at 953. Rather, its role with regard to fee payments is that of a conduit that forwards the applicant's fee payment along with the application to the Commission. In this regard, the legislative history of 47 U.S.C. § 332(b)(1) indicates a congressional concern with efficiency in private land mobile licensing. Conference Rep. No. 97-765, 97th Cong. 2nd Sess. 53-56, reprinted 1982 U.S. Code Cong. & Ad. News 2296-98. Thus, the statutory authority to utilize frequency coordinators implies the authority to implement frequency coordination in a manner reasonably designed to facilitate the efficient handling of applications. To this end, we determined that coordinators should file applications with the Commission. *Frequency Coordination*, *supra* at 1105. The *Fee Program* merely superimposed a requirement that coordinators forward an applicant's fee payment onto a procedure that previously had been determined to be the most efficient means of handling applications subject to coordination. Accordingly, the filing procedures involving frequency coordinators are within the mandate of 47 U.S.C. § 332(b)(1).

59. To assist applicants that file through frequency coordinators, we believe it would be helpful if our rules specify the options available for fee submissions, and we have amended section 1.1102 to do so. It should also be noted that banks have dishonored stale checks in cases where the applicant included a fee check with its initial submission to the coordinator and coordination was delayed. Applicants should keep this possibility in mind when deciding whether to include the fee check initially or after coordination, and frequency coordinators should take steps to ensure that an applicant's payment instrument remains current.

60. As we indicated in both *Frequency Coordination* and the *Fee Program*, frequency coordinators are expected to act in a responsible manner. We would consider a refusal by a frequency coordinator to inform an applicant of the results of coordination to be in derogation of this duty. *Frequency Coordination*, *supra* at 1105. In this regard, we also indicated that applicants could request a frequency other than the one suggested by the coordinator. *Frequency Coordination*, *supra* at 1125-26. Thus, where an application submitted to a coordinator specifies a particular frequency, it may be presumed that the applicant is

requesting that frequency. In these circumstances, the coordinator has an affirmative obligation to inform the applicant before filing the application requesting a different frequency. Moreover, upon request, coordinators are obligated to supply the applicant with a copy of the application as filed with the Commission, and, if the applicant requests it, the frequency coordinator can have the copy date stamped by the Commission for return to the applicant. *Frequency Coordination, supra* at 1105; see also ¶ 51 above. We believe that this clarification of the obligations of the frequency coordinator and the options available to the applicant alleviate the concerns expressed by the petitioner.

CONCLUSIONS

61. We have carefully considered the formal and informal requests to reconsider, modify and/or clarify various aspects of the *Fee Program*. On the basis of that review and our own experiences administering the program for the past year, we believe that the modifications and clarifications made herein will facilitate the collection of fees and make the program more equitable to the benefit of the public and the government.

62. In addition to the changes noted above, the rules containing the fee schedules (47 C.F.R. §§ 1.1102, 1.1103, 1.1104, and 1.1105) are being reformated for clarity and ease of application. While so doing, we have corrected a typographical error in 47 C.F.R. § 1.1102 n.6.

63. The decision contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, and/or record keeping, labeling, disclosure, or record retention requirements, and it will not increase or decrease burden hours imposed on the public.

64. Accordingly, IT IS ORDERED, that Parts 0 and 1 of the Commission's rules, 47 C.F.R. Parts 0, 1, ARE AMENDED, as set forth in Appendix A below.

65. As the rule changes set forth in Appendix A are all procedural, they will be effective immediately upon release of this Memorandum Opinion and Order. 5 U.S.C. § 553(d). Moreover, it is our intention to apply the rules, clarifications and policies enunciated herein to all pending cases involving the collection of fees unless it appears that the filer acted in reliance on prior contrary pronouncements to its detriment. On the other hand, we will not apply these rules, clarifications and policies to cases in which a final determination on the applicability of fees has been made.

66. Authority for this action is contained in sections 4(i) and 8(f) of the Communications Act of 1934, as amended.

67. For further information on this proceeding, contact Martin Blumenthal, Office of General Counsel, 202/254-6530.

FEDERAL COMMUNICATIONS COMMISSION2

H. Walker Feaster, III
Acting Secretary

APPENDIX A

1. The authority citation for Part O continues to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. § 155, unless otherwise noted.

2. Section 0.401 is amended by adding new paragraph (b)(1)(iii), as follows:

* * * * *

(b) * * *

(1) * * *

(iii) Applications for a new television translator or a new low power television station or for major changes in the authorized facilities of such stations can be filed only during certain window periods specified in separate Commission Public Notices. The application delivery locations and addresses for such window filings are announced in those Public Notices.

* * * * *

3. The authority citation for Part 1, Subpart G continues to read as follows:

Authority: Sec. 5002(e) and (f), Pub. L. No. 99-272, 100 Stat, 82, 118-121, 47 U.S.C. § 158.

4. Section 1.1102 is revised to read as follows:

§ 1.1102. Schedule of Charges for Private Radio Services

Except as provided elsewhere in this subpart, the charges prescribed below are required for all requests for private radio authorizations submitted to the Commission.

(a) Marine Coast Stations (includes classes of station listed in § 80.17, except "Ship Station)

(1) New Authorization 60

(no fee for special temporary authority or duplicate licenses)

(2) Modification or Assignment 60

no fee to inform the FCC of changes in licensee name or address, vessel name, or that station is no longer in service)

(3) Renewal 60

(concurrent modification and renewal on FCC Form 503 requires a fee of60 per station)

(b) Operational Fixed Microwave Stations

(1) New Authorization 135

(no fee for special temporary authority or duplicate license)

(2) Modification or Assignment 135

(no fee to inform FCC of changes of licensee name or address, or that station is no longer in service)

(3) Renewal 135

(concurrent modification and renewal on FCC Form 402 requires a fee of135 per station)

(c) Aviation Ground Stations (includes all radio stations licensed under Part 87 except Civil Air Patrol stations)

(1) New Authorization 60

(no fee for special temporary authority or duplicate licenses)

(2) Modification or Assignment 60

(no fee to inform FCC of changes in licensee name or address, or that a station is no longer in service)

(3) Renewal 60

(concurrent modification and renewal on FCC Form 406 requires a fee of60 per station)

(d) Land Mobile Radio Licenses (includes all radio services regulated under Part 90 as well as the general mobile radio services (Part 95); for applications filed by certified frequency coordinators under 47 C.F.R. § 1.912(b), applicants may either attach the fee payment instrument, payable to the Federal Communications Commission, to the application when it is submitted for coordination or request that the coordinator report the results of coordination before the fee instrument is submitted to the coordinator for attachment to the application to be forwarded to the Commission)

(1) New Authorization 30

(each request consisting of not more than six specific fixed stations requires a fee of 30; an additional fee of30 is required for each increment of six fixed stations; no fee for special temporary authority or duplicate licenses)

(2) Modification or Assignment 30

(fee required for each increment of six fixed stations; no fee to inform FCC of changes in licensee name or address, the number or locations of station control points, the number or location of control stations meeting the requirements of section 90.119(a)(2)(ii), the number of mobile units operated by radiolocation service licensees, or that the station is no longer in service)

(3) Renewal 30

(concurrent modification and renewal made on FCC Form 574 requires a fee of30 per station license)

5. Section 1.1103 of the Commission's rules is revised to read as follows:

§1.1103. Schedule of Charges for Equipment Approval Services

Except as provided elsewhere in this subpart, the charges prescribed below are required for all requests for equipment approvals submitted to the Commission.

(a) Certification (fees are also required under the abbreviated procedures for private label equipment and nonpermissive changes)

(1) Receiver (except TV & FM receivers) 250

(2) All Other Devices (per device) 650

(b) Type Acceptance

(1) Approval of Subscription TV System 2,000

(modifications that require a new application for advance approval will require an additional fee of2000)

(2) All Other 325

(fee also applies for non-permissive changes that require a new application for type acceptance)

(c) Type Approval (all devices)

(1) With Testing 1,300

(also applies to major modifications that require testing)

(2) Without Testing 150

(applies to previously tested and approved equipment resubmitted for approval under new identification or for minor modification without FCC testing)

(d) Notification 100

6. Section 1.1104 is revised to read as follows:

§1.1104. Schedule of Charges for Mass Media Services

Except as provided elsewhere in this subpart, the charges prescribed below are required for all requests for mass media authorizations submitted to the Commission.

(a) Commercial TV Stations

(1) New or Major Change Construction Permit 2,250

(2) Minor Change 500

(no fee for requests for special temporary authority, requests for extension of time and/or replacement of construction permits, requests for remote control operation, or modifications that may be made without prior FCC authorization)

(3) Hearing 6,000

(for each application designated for a comparative hearing; fee is due with notice of appearance (§ 1.221); *see also* § 1.1111(c))

(4) License 150

(no fee to request a modified station license to reflect changes that do not require prior FCC authorization)

(5) Assignment or Transfer (per station, regardless of number of forms used)

(i) Form 314/315 500

(ii) Form 316 70

(6) Renewal 30

(b) Commercial Radio Stations

(1) New or Major Change Construction Permit

(i) AM Station 2,000

(ii) FM Station 1,800

(2) Minor Change (no fee for requests for special temporary authority, requests for extension of time and/or replacement of construction permits, requests for remote control operation, or modifications that do not require prior FCC authorization)

(i) AM 500

(ii) FM 500

(3) Hearing 6,000

(see paragraph (a)(3) above)

(4) License

(no fee to request a modified station license to reflect changes that do not require prior FCC authorization)

(i) AM 325

(no fee for requests to determine power by the direct method)

(ii) AM Directional Antenna 375

(in addition to the AM License Fee)

(iii) FM 100

(5) Assignment or Transfer

(per station, regardless of number of forms used)

(i) Forms 314/315 500

(ii) Form 316 70

(6) Renewal 30

(c) FM Translators

(1) New or Major Change Construction Permit 375

(2) License 75

(3) Assignment or Transfer 75

(Forms 345/316; per station, regardless of number of forms used)

(4) Renewal 30

(d) TV Translators and LPTV Stations

(1) New or Major Change Construction Permit 375

(2) License 75

(no fee to obtain a modified station license to reflect change in type of TV transmitter antenna or output power of TV aural or visual transmitters to accommodate a change in the antenna type or transmission line)

(3) Assignment or Transfer 75

(Forms 345/316; per station, regardless of number of forms used)

(4) Renewal 30

(e) Auxiliary Services (includes Remote Pickup stations, TV Auxiliary Broadcast stations, Aural Broadcast STL and Intercity Relay stations, and Low Power Auxiliary stations)

(1) Application 75

(fee for major application: new station; change in frequency, antenna system, power, and number of mobiles; relocation of stations; addition of a base station; and replacement of equipment)

(2) Renewals 30

(no fee for renewal of auxiliaries held by a broadcast licensee when requested in conjunction with the renewal application for its broadcast station)

(f) Cable Television Service

(1) Cable Television Relay Service

(i) Construction Permit 135

(ii) Assignment or Transfer 135

(Form 327; per station, regardless of number of forms used)

(iii) Renewal 135

(iv) Modification 135

(2) Cable Special Relief Petition 700

(fee for filings under section 76.7 of the rules seeking an exemption from the rules or the imposition of special requirements beyond those provided in the rules)

(g) Direct Broadcast Satellite

(1) New or Major Change Construction Permit

(i) Application 1,800

(a major change is considered any modification involving a significant, additional use of the orbit/spectrum resource)

(ii) Issuance of Construction Permit & Launch Authority 17,500

(iii) License to Operate Satellite 500

(2) Hearing 6,000

(see (a)(3) above)

7. Section 1.1105 is revised to read as follows:

§ 1.1105. Schedule of Charges for Common Carrier Service Requests

Except as provided elsewhere in this subpart, the charges prescribed below are required for all requests for common carrier authorizations submitted to the Commission, including requests for developmental authorizations.

(a) Domestic Public Land Mobile Stations (includes Base Dispatch, Control & Repeater Stations)

(1) New or Additional Facility (per transmitter) 200

(2) Assignment or Transfer (per call sign) 200

(3) Renewal (per call sign) 20

(4) Minor Modification (per call sign) 20

(b) Air-Ground Individual License (per station)

(1) Initial License 20

(2) Renewal 20

(3) Modification 20

(c) Cellular Systems (per system)

(1) New or Major Change Construction Permit 200

(2) Assignment or Transfer 200

(3) Initial covering license

(i) Wireline carrier 525

(ii) Nonwireline carrier 50

(4) Renewal 20

(5) Minor modification 50

(6) Additional license 50

(d) Rural Radio (includes Central Office, Interoffice or Relay Facilities)

(1) Initial Construction Permit (per transmitter) 90

(2) Assignment or Transfer (per call sign) 90

(3) Renewal (per call sign) 20

(4) Modification (per call sign) 20

(e) Offshore Radio Service (fees would also apply to any expansion of this service into coastal waters other than the Gulf of Mexico)

(1) Initial Construction Permit (per transmitter) 90

(2) Assignment or Transfer (per transmitter) 90
(3) Renewal (per call sign) 20
(4) Modification (per call sign) 20

(f) Domestic Public Fixed Radio Services (Part 21)

(1) Point-to-Point Microwave and Local Television Radio Service

(i) Conditional License (per station) 135
(no fee to request special temporary authority or waiver of construction authorization requirements)

(ii) Modification of Conditional License 135
(per station; no fee for permissive changes that do not require a modified conditional license)

(iii) Initial License for New Frequency 135
(per station) (certification of completion of construction, in addition to fee for conditional license)

(iv) Renewal (per licensed station) 135

(v) Assignment or Transfer (per authorized station) 45

(2) Multipoint Distribution Service (including multichannel MDS)

(i) Conditional License (per station) 135
(no fee for requests for special temporary authority or a waiver of the construction authorization requirements)

(ii) Modification of Conditional License 135
(per station; no fee for permissive changes that do not require modified conditional license)

(iii) Initial License for New Frequency 400
(per channel; certification of completion of construction, in addition to the fee for conditional license)

(iv) Renewal (per licensed station) 135

(v) Assignment or Transfer (per authorized station) 45

(3) Digital Electronic Message Service

(i) Conditional License (per nodal station) 135
(no fee for requests for special temporary authority or a waiver of the construction authorization requirements)

(ii) Modification of Conditional License 135
(per nodal station; no fee for permissive changes that do not require modified conditional license)

(iii) Initial License (per nodal station) 135
(certification of completion of construction, in addition to the fee for conditional license)

(iv) Renewal (per licensed nodal station) 135

(v) Assignment or Transfer 45
(per authorized nodal station)

(g) International Fixed Public Radio (Public & Control Stations)

(1) Initial Construction Permit (per station) 450
(2) Assignment or Transfer (per application) 450
(3) Renewal (per license) 325
(4) Modification (per station) 325

(h) Satellite Services

(1) Transmit Earth Stations (per earth station)

(i) Initial Station Authorization 1,350
(per application to construct and/or operate a domestic or international transmitting earth station for private or common carrier service or for telemetry, tracking, and command functions)

(ii) Assignment or Transfer 450

(iii) All Other Applications 90
(includes applications for regular or temporary authorization, renewal or modification of station authorizations, or waivers)

(2) Small Transmit/Receive Earth Stations (2 meters or less operating in the 4/6 GHz frequency band)

(i) Lead Authorization (per application) 3,000
(the first earth station authorization in a network)

(ii) Routine Authorization (per earth station) 30
(requested under the terms and conditions of the lead authorization)

(iii) All Other Applications (per earth station) 90
(includes, but is not limited to, regular or temporary authorizations, renewals, transfers, assignments, modifications, waivers, and developmental authority)

(3) Receive Only Earth Stations (these requests involve regular commercial receive-only earth stations for which protection from interference is being requested)

(i) Initial Station Authorization 200

(ii) All Other Applications 90
(see (h)(2)(iii) above)

(4) Space Stations

(i) Application for Authority to Construct 1,800
(for domestic and international space stations, also applies to requests to construct an in-orbit or on-ground spare)

(ii) Application for Authority to Launch & Operate 18,000
(also applies to request launch and later operate an in-orbit spare)

(5) Satellite System Application (technically identical small earth station antennas that operate in bands where frequency coordination is not required, such as the 12/14 GHz, and interconnect with each other; fees apply to fixed-satellite systems, the radiodetermination satellite service and the mobile satellite service)

(i) Initial Authorization (per system) 5,000

(ii) Assignment or Transfer (per system) 1,333

(iii) All Other Applications (per request) 90

(i) Section 214 Applications (each 214 request to install r acquire communications channels, regardless of the number of communications channels requested, will require only one multiple of the applicable fee)

(1) Overseas Cable Construction 8,100
(2) Domestic Cable Construction 540
(3) All Other 214 Applications 540
(no fee for requests to reduce or discontinue service, or 214 applications that are submitted purely for notification purposes)

(4) Telephone Equipment Registration (Part 68) 135

(j) Tariff Filings

(1) Filing Fee 250
(for each Tariff Publication which is accompanied by a Letter of Transmittal)

(2) Special Permission Filing (per filing) 200

8. Section 1.1107 is amended by revising paragraph (b) to read as follows:

* * * * *

(b) Filings subject to a fee under this subpart that are submitted without a fee, with an insufficient fee, with a fee payment in an improper form (see § 1.1108), or with a payment instrument that is uncollectable shall be dismissed and the application returned to the applicant or its designated agent without processing. *See* also § 1.1114.

* * * * *

9. Section 1.1108 is amended by the adding new paragraphs (b)(4) and (d), as follows:

* * * * *

(b) * * *

(4) The Commission may accept multiple money orders in payment of a fee for a single application where the fee exceeds the maximum amount for a money order established by the issuing agency and the use of multiple money orders is the only practical method available for fee payment.

* * * * *

(d) Receipts for fee submissions will not be furnished. An applicant may request a copy of its application date stamped by the Commission. An extra copy of the application should be provided for this purpose, and those filing by mail should provide a stamped, self-addressed envelope for the return of the date stamped copy of the application. Applicants filing through frequency coordinators *(see* §§ 1.912 and 1.1102 of this part) may obtain a date stamped copy of their application as filed in this manner.

10. Section 1.1108 is amended by deleting the "Note" at the end of the provision.

11. Section 1.1111 is amended by adding new paragraphs (b) and (c), as follows:

* * * * *

(b) When an application for new or modified facilities is not timely filed in accordance with the filing window as established by the Commission in a public notice specifying the earliest and latest dates for filing such applications.

(c) Applicants in the Mass Media Services designated for comparative hearings will be entitled to a grant without payment of the hearing fee or a refund of the hearing fee paid in the following circumstances.

(1) When a settlement agreement filed with the presiding judge by the Notice of Appearance deadline (see § 1.221) provides for the dismissal of all but one of the applicants, and the single remaining applicant is immediately grantable, no hearing fee is due. However, if the applicant cannot be granted without resolution of matters specified in the designation order, it must pay the hearing fee. That payment will be refunded upon request if all outstanding matters can be deleted. *See* § 1.229.

(2) When only one applicant files a Notice of Appearance and pays the hearing fee, that single remaining applicant will be entitled to a refund of the hearing fee upon request if it is immediately grantable or if all matters specified in the designation order and requiring resolution can be deleted. *See* § 1.229.

(3) However, hearing fees paid pursuant to (1) or (2) above will be retained by the Commission in any case requiring a decision on the merits of an applicant's post-designation amendment or evidentiary showing, whether by Summary Decision or otherwise. *See* §§ 1.251 and 1.267.

12. Section 1.1112 is amended by revising paragraphs (a) and (e) to read as follows:

* * * * *

(a) Applications filed for the sole purpose of modifying an existing authorization (or a pending application for authorization) in order to comply with new or additional requirements of the Commission's rules or the rules of another Federal agency. However, if the applicant also requests an additional modification, renewal, or other action, the appropriate fee for such additional request must accompany the application. Cases in which a fee will be paid include applications by FM and TV licensees or permittees seeking to upgrade channel after a Rule Making.

* * * * *

(e) Other applicants, permittees, or licensees providing, or proposing to provide, a noncommercial educational or instructional service, but not qualifying under § 1.1112(c), may be exempt from filing fees, or be entitled to a refund, in the following circumstances.

(1) An applicant is exempt from filing fees if it is an organization that, like the Public Broadcasting Service or National Public Radio, receives funding directly or indirectly through the Public Broadcasting Fund, 47 U.S.C. § 396(k), distributed by the Corporation for Public Broadcasting, where the authorization requested will be used in conjunction with the organization on a noncommercial educational basis;

(2) An applicant for a translator or low power television station that proposes a noncommercial educational service will be entitled to a refund of fees paid for the filing of the application when, after grant, it provides proof that it has received funding for the construction of the station through the National Telecommunications and Information Administration (NTIA) or other showings as required by the Commission.

(3) An applicant that has qualified for a fee refund under § 1.1112(e)(2) and continues to operate as a noncommercial education station is exempt from

fees for broadcast auxiliary stations (Subparts D, E, and F of Part 74) or stations in the private radio or common carrier services where such authorization is to be used in conjunction with the noncommercial educational translator or low power station.

(4) An applicant that is the licensee of an instructional television fixed station (§74.901 *et seq.*) is exempt from filing fees where the authorization requested will be used by the applicant in conjunction with the provision of the instructional service.

* * * * *

13. Section 1.1114 is amended by revising paragraph (a), as follows:

(a) Filings subject to fees and accompanied by defective fee submissions will be dismissed under section 1.1107(b) of this subpart where the defect is discovered by the Commission's staff within 30 calendar days from the receipt of the application or filing by the Commission.

(1) A defective fee may be corrected by resubmitting the application or other filing, together with the entire correct fee.

(2) For purposes of determining whether the filing is timely, the date of resubmission with the correct fee will be considered the date of filing. However, in cases where the fee payment fails due entirely to bank error, the date of the original submission will be considered the date of filing.

* * * * *

14. Section 1.1116 is amended by designating the present text as paragraph (a) and adding a new paragraph (b), as follows:

(a) * * *

(b) Actions taken by the Fee Section staff are subject to the reconsideration and review provisions of §§ 1.106 and 1.115 of this part, EXCEPT THAT reconsideration and/or review will only be available where the applicant has made the full and proper payment of the underlying fee as required by this subpart.

(1) Petitions for reconsideration and/or applications for review submitted by applicants that have not made the full and proper fee payment will be dismissed; and

(2) If the fee payment should fail while the Commission is considering the matter, the petition for reconsideration or application for review will be dismissed.

FOOTNOTES

[1] In addition to commercial FM, low power TV, and TV translators referred to in section 73.3564(d), the Commission also utilized filing windows for the submission of applications for new and/or modified facilities in other services, including cellular radio, by announcing the earliest and latest dates by which such applications may be filed.

[2] By letter of July 8, 1987, the Managing Director determined that C&H Broadcasting should pay a filing fee for an application to change channel where: the licensee's initial construction permit was taken subject to the outcome of a pending Rule Making; the applicant could have requested the channel change prior to the effective date of the *Fee Program;* and there was no reason for the delay in the filing of the application. As the Managing Director's conclusion was based on the particular facts of the case rather than the absence of a specific exemption, that decision is unaffected by our determination herein.

[3] In providing this exemption for ITFS, we recognize that interconnection facilities may also be used to provide commercial service when the system is not being utilized for instructional programming. *See* 47 C.F.R. § 74.931(c). Similarly, noncommercial educational television stations are exempt from fees for broadcast auxilliary and other similar facilities that may also be used for commercial purposes. *See* 47 C.F.R. § 74.621(f).

[4] There may be circumstances in which a petition for significantly viewed status requests the application of standards other than those set forth in Section 76.54. In that case, the "significantly viewed" petition would be more appropriately handled as a request for special relief, and it will be subject to the fee.

[5] For example, G & D Communications, Inc. has requested a refund of the hearing fee paid by it in MM Docket 87-330 where the only competing applicant did not file a Notice of Appearance and was dismissed by the Administrative Law Judge.

[6] For example, Gary Van Veghten reached a timely settlement with the competing applicants in MM Docket 87-245, but his application could not be granted until the ALJ resolved an "air hazard" issue. Similarly, Walter Gray Gilbert reached a timely filed settlement in Docket 87-492, but a grant of his application also required resolution of an "air hazard" issue.

[7] Under the policy adopted herein, G&D is entitled to a refund of the hearing fee paid with its Notice of Appearance. In the Van Veghten case, the applicant was granted after deletion of the issue, and it is entitled to a refund. In the Gilbert case, the applicant was granted on a motion for summary decision, and there will be no refund of the hearing fee.

[8] Pending a decision on reconsideration of the *Fee Program*, the Managing Director has waived the one instrument rule for payments by money order where the applicant asserts that the amount of the fee exceeds the limit for a single money order of the type used. *See, e.g.*, Letter ruling on Desert Springs Communications, July 13, 1987.

[9] A money order represents the financial obligation of the institution upon which it is drawn, rather than the remitter (the individual purchasing the money order). As such, the degree of confidence with which a money order is viewed would depend on the institution that issues it. *See generally*, Uniform Commercial Code § 3-104 note 22; Personal Money Orders and Teller's Checks; Mavericks Under the UCC, 67 Col. L. Rev. 524 (1967).

[10] During the past year, some checks on foreign banks were inadvertently accepted. After the checks were credited to our account for payment to the Treasury, we received debit notices indicating that the checks did not clear for the full face amount.

[11] Although decided on other grounds, the Managing Director's decision on the request for reconsideration filed by Vince Lee Broadcasting Ltd. provides an example of the type of showing that could justify reinstatement on the basis of bank error. Letter to Richard Waysdorf, January 4, 1988.

[12] That section states: "The Commission, in coordinating the assignment of frequencies to stations in the private land mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government." 47 U.S.C. § 332(b)(1).

Before the
Federal Communications Commission
Washington, D.C. 20554

CORRECTED

In the Matter of

IDB COMMUNICATIONS	File No. CSG-88-049-P/L
GROUP, INC.	File No. CSG-88-073-P/L

Application for authority to construct and operate a 4/6 GHz earth station at Culver City, California, for provision of INTELSAT Business Services, International Television Service and SCPC Audio Service

Application for authority to construct and operate an 11/14 GHz earth station at Culver City, California, for provision of INTELSAT Business Services, International Television Service and SCPC Audio Service

ORDER AND AUTHORIZATION

Adopted: September 8, 1988; Released: September 30, 1988

By the Chief, International Facilities Division:

1. The captioned applications, filed on June 3, and July 19, 1988, respectively, by IDB Communications Group, Inc. (IDB), request authority, pursuant to Title III of the Communications Act of 1934 and Section 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, to construct and operate international earth stations at Culver City, California, for provision of INTELSAT Business Services (IBS), International Television Service, and Single-Channel-Per-Carrier (SCPC) audio service. The applications were placed on public notice on June 22, and August 3, 1988, respectively. Application File No. CSG-88-073-P/L was amended on September 7 and 8, 1988. No comments were received. IDB has been granted blanket authority to establish and operate channels of communication between the U.S. and various international points for provision of IBS, international television and SCPC audio services.[1]

2. The proposed facilities will consist of two antennas, one a 13.1 meter antenna which shall meet INTELSAT Standard B technical parameters and communicate with INTELSAT V Pacific Ocean Region (POR) satellites in the 4/6 GHz band, and the other a 4.57 meter antenna which shall meet INTELSAT Standard E-1 technical parameters and communicate with INTELSAT V POR satellites in the 11/14 GHz band. The earth stations will be located at Culver City, California, and will be used to provide a full range of IBS, television and SCPC audio to international points via INTELSAT POR satellites.

3. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[2] In that Order, the Commission distinguished between IBS and/or television earth stations and multipurpose stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose stations. It also determined that the public interest requires that IBS be introduced in the United States as soon as possible. The Commission therefore concluded that it would consider only minimal legal, financial, and technical qualifications of the applicant as required by Section 308 and 319 of the Communications Act, when processing IBS and television service applications. The Commission further concluded that absent special problems, it would treat these applications as routine and expeditiously process them. [3] The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[4]

4. The applicant's legal, technical, and financial qualifications to construct and operate the proposed earth stations are established. The applicant has been authorized to construct and operate other IBS earth stations.[5] The proposed earth stations shall comply with INTELSAT Standard B (13.1 meter antenna) and Standard E-1 (4.57 meter antenna) technical parameters for earth stations. IDB has completed the necessary frequency coordination.

5. The scope of operation of the proposed stations will be the same as that permitted by the Commission in previous IBS, television and SCPC authorizations. We will limit the authorization to the provision of IBS and those video services compatible with the stations' digital format operation, television and SCPC. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed stations. However, it may not provide any service which falls outside the IBS/television service category. Any authorization to use the proposed stations as a multipurpose earth station would require a determination as to traffic and revenue diversion from existing multipurpose earth stations that may result.

6. Upon consideration of the applications, we find that authorization of requested services and facilities is in the public interest.

7. Accordingly, IT IS ORDERED that applications File Nos. CSG-88-049-P/L and CSG-88-073-P/L ARE GRANTED, and IDB is authorized to:

a. construct and operate the proposed 13.1 meter antenna at Culver City, California, for provision of IBS and related digital video services, international television service and SCPC audio service; and

b. construct and operate the proposed 4.57 meter antenna at Culver City, California, for provision of IBS and related digital video services, international television service and SCPC audio service.[6]

8. Before completion of equipment installation and facility activation, IDB shall provide the Commission with a summary of equipment which was actually installed.

9. This order is issued under Section 0.291 of the Commission's Rules and Regulations and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* IDB Communications Group, Inc., DA 86-412, released December 31, 1986, (File No. I-T-C-87-013) and DA 88-1400, released September 13, 1988 (File No. I-T-C-88-048).

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of IBS and/or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] *See* cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327 (released March 25, 1986).

[5] *See* IDB Communications Group, Inc., DA 88-1029, released July 15, 1988 (File No. CSG-87-034-P/L).

[6] This authorization is not to be construed as permitting the provision of IBS, SCPC and television services between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petitions Seeking Average
Schedule Settlements for
Affiliated Cost Companies with
5,000 or Fewer Access Lines

MEMORANDUM OPINION AND ORDER

Adopted: September 20, 1988; Released: October 5, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The Commission's rules permit certain local exchange carriers (LECs) to receive compensation for the use of their facilities in originating and terminating interstate calls on the basis of schedules that approximate average costs (the "average schedules") rather than on the basis of their own costs. Eligibility for this compensation is limited to those LECs that had been receiving interstate settlements on that basis as of December 1, 1982. The Commission's rules permit average schedule LECs to convert to "cost" status (and receive settlements based on their actual costs), but not *vice versa*. On January 30, 1987, the National Exchange Carrier Association (NECA), which now administers the average schedules, filed a petition seeking a waiver of the Commission's rules to provide LECs with 5,000 or fewer access lines that settle on the basis of actual costs a one-time option to elect to settle on the basis of the average schedules.[1] On June 23, 1987, we granted the waiver.[2] In doing so, we interpreted NECA's waiver request to be applicable only to those LECs that, with all affiliates, have 5,000 or fewer access lines. [3]

2. Several parties filed petitions seeking reconsideration of the *Waiver Order* insofar as it limits eligibility for conversion to average schedule status to exchange carriers that, with all affiliates, had 5,000 or fewer access lines.[4] These petitions do not challenge the use of the 5,000 line cut-off, but do argue that it should be applied to individual LECs and not to groups of affiliated companies. Separate petitions seek a determination that four exchange carriers[5] are, for the purpose of average schedule settlements eligiblity, not affiliated in a manner that should preclude eligibility under the *Waiver Order*,[6] and, therefore, are entitled to average schedule settlements from January 1, 1988, adjusted for cost study settlements that the Inland Companies had received from that date.[7]

3. In this order we provide a one time opportunity to all exchange carriers with fewer than 5,000 access lines that are now settling on a cost basis to elect average schedule settlements. This option must be exercised by December 31, 1988, and will become effective April 1, 1989. We also conclude that the Inland Companies are affiliated and therefore, *nunc pro tunc* average schedule settlements from January 1, 1988, for those companies are not warranted.

II. THE WAIVER AND RECONSIDERATION PETITIONS.

A. The Petitions

4. Petitioners oppose the conclusion in the *Waiver Order* that the lines of all affiliated LECs should be counted in determining whether a LEC satisfied the 5,000 line limitation for conversion to average schedule.[8] The petitioners contend principally that: (1) NECA did not intend to limit its waiver request to include affiliated exchange carriers in calculating the 5,000 line limitation; (2) this Commission's policy reasons for granting the waiver are equally applicable to all exchange carriers with 5,000 or fewer access lines, irrespective of affiliation; (3) NECA's revenue requirement impact estimates, on which this Commission relied, assumed that all eligible exchange carriers would, irrespective of affiliation, convert to average schedules; (4) the petitioning exchange carriers must employ cost consultants since they are too small to perform their own cost studies, with the consequence that affiliation does not result in a reduction in their expenses of preparing cost studies.[9]

B. Discussion

5. In its petition, NECA identified a number of factors affecting average schedule settlements that, it argued, had changed since December 1, 1982, the reference date for determining average schedule status under Section 69.605(c) of the Commission's rules. It argued, and in the *Waiver Order* we agreed, that, in light of these changed circumstances, small LECs should be given an opportunity to convert to average schedule status. It limited its request to small LECs because small LECs were most affected by the changes it identified, and because including mid-size and large LECs could have substantial effects on interstate revenue requirements. It proposed 5,000 access lines as the appropriate size criterion and described the limitation as "consistent with the settlement options afforded to small average schedule companies in the Commission's September 30, 1986 Order."[10] That Order provided that exchange carriers that, with all affilates, had fewer than 5,000 access lines could elect to receive an additional two months' compensation under the old average schedules when new average schedules became effective June 1, 1986.[11] NECA's petition also argued that the Commission should not permit exchange carriers with more than 5,000 access lines to elect average schedule settlements, stating:

> [t]his limitation is necessary to ensure that the effects on existing average schedule companies are minimized as future updates to average schedule formulas include the cost and demand characteristics of the companies electing this option. NECA estimates significant impacts would result from including companies with more than 5,000 lines.[12]

NECA also argued that it was necessary to exclude exchange carriers with more than 5,000 access lines from converting to average schedule settlements so that settlement fluctuations, "as well as potential NECA rate changes, can be minimized by limiting the size of exchange carriers which may elect to convert from cost to average schedules."[13] NECA viewed its proposed limitation on the size of exchange carriers that could convert as sufficiently important that it specifically requested "an

opportunity to reevaluate this petition for waiver" if the Commission were to conclude that exchange carriers with more than 5,000 access lines should be permitted an option to convert from cost to the average schedules.[14] In light of these statements, we interpreted NECA's request as a request for waiver that was "consistent with" the affiliation limitation that the Commission had employed in granting transitional relief to small average schedule companies.[15]

6. On August 21, 1987, after petitions had been filed by Alltel Corporation, Bridge Water and Norman County Telephone Companies, and the Inland Companies, and noted by NECA, Mr. John Grieg, NECA Director of Tariff and Regulatory Matters, filed a letter that, *inter alia*, stated:

> [a]lthough NECA does not intend to file formal comments with respect to these filings, the Commission should be aware that NECA is able to administer settlements pursuant to the affiliation provisions of the Commission's order released June 23, 1987 or, under provisions which are not restricted by affiliation. NECA believes the settlement increases which might result from the removal of the affiliation criteria would likely be insignificant.[16]

This statement is consistent with the contentions of those petitioners who maintain that the revenue requirement estimate that accompanied NECA's petition[17] included *all* average schedule companies with fewer than 5,000 access lines, irrespective of affiliation, and NECA has recently clarified that this is the case.[18] Morever, no party, including NECA, now contends that allowing all exchange carriers with 5,000 or fewer access lines to elect average schedule settlements would have a material effect on interstate revenue requirements or interstate rates. Thus it appears, as noted by the petitioners, that permitting such an election would provide an opportunity for small cost companies to effect savings in administrative and cost studies expenses and would do so with insignificant effects on average schedule settlements. As a consequence, we have decided to provide a one-time conversion opportunity to all cost companies[19] with fewer than 5,000 access lines that were precluded from electing average schedule status pursuant to the *Waiver Order* on the basis that, with all affiliated LECs, they served more than 5,000 access lines.[20] To elect average schedule status these companies should certify to NECA their change in settlements status on or before December 31, 1988. Such an election would permit an exchange carrier to receive interstate average schedule settlements after March 31, 1989.

7. NECA also observed that permitting additional cost companies, with fewer than 5000 access lines, to elect average schedule status will result in "lower formula settlement levels" in the future.[21] NECA stated:

> [s]ubsequent updates of the average schedule formulas would recognize the lower costs of these companies and offset this initial increase in revenue requirements through lower formula settlement levels. Long term cost savings would also be realized through reduced administrative burdens including elimination of the need for separations studies.[22]

In light of NECA's representation that these savings will be manifest in future reductions in interstate revenue requirements, we direct NECA to document the reductions in average schedule settlements costs that will result from the inclusion of these additional companies in each annual access tariff filing that is subsequent to the date of this order.

III. THE INLAND PETITIONS.

A. The Petitions

8. On July 31, 1987, the Inland Companies filed a petition for declaratory ruling or waiver, contending that they were not affiliated in such a manner that would, or should, preclude them from being able to elect average schedule settlements status under the *Waiver Order*.[23] The Inland Companies assert that they provided timely notification to NECA of their election to convert to average schedule status, but that NECA refused to honor their election because the Inland Companies were affiliated and on an affiliated basis they exceeded the 5,000 line limitation.

9. In support of their contention that they were not, and are not, affiliated, the Inland Companies state that they (1) have never pooled revenues or profits;[24] (2) have always undertaken separate cost studies;[25] (3) file individual tariffs;[26] (4) are not commonly controlled by the same board;[27] (5) have some common owners, but ownership proportions that vary substantially among the four companies;[28] (6) separately allocate any joint costs;[29] (7) employ an outside consulting firm that has been instructed to keep the financial affairs of each company separate;[30] (8) maintain separate books of account for each company;[31] (9) issue their own bills so that customers receive bills directly from the company that provides them with telephone service;[32] (10) do not serve overlapping exchange areas and do not share plant and equipment.[33] In a subsequent filing, the Inland Companies contend that they are entitled to average schedule settlements from January 1, 1988, which is the date they would have been eligible for such settlements had NECA accepted their election to convert to average schedule status.[34]

B. Discussion

10. The Inland Companies' principal contention is that they are not affiliated exchange carriers.[35] As discussed below, we conclude, on the basis of the facts presented in the present record, that the Inland Companies are, in fact, affiliated, and were, therefore, ineligible to elect to be treated as average schedule companies under the terms of the *Waiver Order*.[36]

11. The Inland Companies are owned and operated by two brothers: James L. Capel, Jr. and William W. Capel. According to the Inland Petition, James L. Capel, Jr. owns 86.9% of Inland, 23.03% of Midland, and 100% of Lakeside. William W. Capel owns 1.2% of Inland, 76.97% of Midland, and 100% of Prairie.

Based on these ownership structures, the petitioners contend that, at most, only two of the four telephone companies may be defined as affiliates of each other since James L. Capel, Jr. owns the majority of the common stock of Inland (3,977 access lines) and Lakeside (762 access lines), while William W. Capel owns the majority of the common stock of Midland (3,899 access lines) and

Prairie (927 access lines).[37] In each case, because both pairs of affiliated companies have fewer than 5,000 access lines, the Inland Companies contend that all four companies should have been permitted to elect average schedule status pursuant to the provisions of the *Waiver Order*.[38]

12. The test as to whether exchange carriers are affiliated under the Commission's rules depends upon the existence of a control relationship.[39] Specifically, Section 32.9000 of the Commission's rules defines affliated companies to be companies "that directly or indirectly through one or more intermediaries, control or are controlled by, or are under common control with, the . . . company." Section 32.9000 of the Commission's rules also defines "control" as:

> the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a company, whether such power is exercised through one or more intermediary companies, or alone, or in conjunction with, or pursuant to an agreement with, one or more other companies, and whether such power is established through a majority or minority ownership or voting of securities, common directors, officers, or stockholders, voting trusts, holding trusts, affiliated companies, contract, or any other direct or indirect means.[40]

13. From a control perspective, Inland's analysis rests upon the proposition that differences in ownership proportions and variations in the composition of the boards of directors of the Capel brothers' companies should lead to the conclusion that the companies are not under common control.[41] However, even granting these factors, such an analysis would not take into account the other aspects of the control relationships that exist among the Inland Companies and the Capel brothers. For example, James L. Capel, Jr. is the Chief Executive Officer of the Inland and Lakeside Telephone Companies, while functioning as Vice-President of the Midland and Prairie Telephone Companies.[42] In symmetrical fashion, William W. Capel is the Chief Officer of the Midland and Prairie Telephone Companies, while also functioning as Vice President of the Inland and Lakeside Telephone Companies.[43] We find these interleaved officer positions to be significant, especially in light of the fact that, as noted above, the majority, or all, of the common stock of each company is owned by one or the other of the two brothers.

14. Furthermore, although the Inland Companies' service areas are scattered throughout the state of Illinois, they are operated by both brothers[44] from a common location in Champaign, Illinois with common, pooled employees.[45] In fact, while each company has a few employees who work only for that company, most of the petitioners' employees are pooled among the companies out of the common, Champaign office.[46] The record reveals, in this regard, that the time of most of the pooled employees is allocated to each company on the basis of the number of access lines that the company has, rather than on the basis of the actual time that each employee spends in addressing the individual needs of each of the Capel brothers' companies.[47]

15. An access line assignment of employee time does not, except by coincidence, accurately reflect the time that is associated with the efforts of any employee in addressing the problems that relate to a particular company. In light of the geographic, travel time, and operational differences that are associated with the varied locations of the companies, we would expect on the basis of our experience that more accurate methods of allocating shared employee time would be used by companies that were, in fact, operated on an unaffiliated basis; and, as a general matter, there would also be less comingling of managerial and employee functions and expenses than is the case here.[48] The fact that both brothers use the same consulting firm "to keep the financial affairs of each company separate,"[49] in addition to other sharings of resources and personnel, also suggest that the companies do not actually operate on an "arms length" basis.[50]

16. Finally, the common control relationship among the companies is further illustrated by the fact that the companies collectively have cast only one common vote in NECA elections.[51] Sections 69.602(a),(f) of the Commission's rules provide that all "commonly controlled companies" shall receive only one vote in the election of NECA directors.[52] NECA has treated the Inland Companies as commonly controlled for voting purposes and the companies have not, at earlier points in time, chosen to petition this Commission to reverse NECA's determination.[53]

17. The petitioners apparently concede the point that for voting purposes they may properly be viewed as being affiliated companies under the Commission's rules,[54] but argue that their voting status is not relevant since the petitioners were confident that "representative" Subset 3 NECA directors would be chosen and the petitioners did not, therefore, perceive the need to attempt to cast more than one vote.[55] If petitioners' voting status were inconsistent with our interpretation of their affiliation status under the Commission's rules, we might be inclined to disregard it as petitioners suggest. However, their status as affiliates for purposes of NECA voting, and petitioners' acquiesence in that status, are consistent with our own interpretation of these rules and is an indication that this interpretation, which was arrived at independently, is reasonable.[56]

18. Finally, petitioners argue that although they may fall within the affiliation and control definitions quoted above, the Bureau did not intend to apply these definitions in the context of the *Waiver Order*.[57] We do not find this remaining argument to be persuasive. There is no indication in the *Waiver Order*, and we did not intend, that any definition other than the one that appears in the Commission's rules should be utilized.

19. We thus conclude that the Inland Companies are affiliated for purposes of the election provided in the *Waiver Order* and were not entitled to convert to average schedule status pursuant to the terms of that Order. Accordingly, the Inland Companies are not entitled to recomputed settlements from January 1, 1988, on the basis of the average schedules, and must, therefore, continue to receive interstate settlements on the basis of accurate interstate cost studies until such time as they have properly converted to average schedule status.[58]

IV. ORDERING CLAUSES.

20. ACCORDINGLY, SUBJECT TO THE CONDITIONS CONTAINED HEREIN, IT IS ORDERED THAT all exchange carriers with 5,000 or fewer access lines, that have settled on the basis of interstate costs prior to January 1, 1988, may elect to receive average schedule settle-

ments after March 31, 1989 by certifying their election to receive such settlements to NECA not later than December 31, 1988.

21. IT IS FURTHER ORDERED THAT the petitions are GRANTED to the extent contained herein, and are in all other respects DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] NECA Petition for Waiver (Jan. 30, 1987).

[2] NECA's Proposed Waiver of Section 69.605(c) of the Commission's Rules, *Memorandum Opinion and Order*, 2 FCC Rcd 3960 (1987)(*Waiver Order*). To qualify for average schedule treatment, a converting cost company was required to notify NECA of its election by July 31, 1987. *Id.* Conversion to average schedule settlements pursuant to the *Waiver Order* occurred on January 1, 1988. *Id.*

[3] *See id.*

[4] Addison Home Telephone Company Petition For Waiver (Aug. 13, 1987), Alltel Corporation Petition For Limited Reconsideration (July 23, 1987), Armstrong Telephone Company Petition For Waiver (Aug. 13, 1987), Bourbeuse Telephone Company (Sept. 18, 1987), Bridge Water Telephone Company and Norman County Telephone Company, Inc. (July 24, 1987), Lathrop Telephone Company waiver petition (Aug. 27, 1987), Lathrop Telephone Company letter of April 6, 1988 (seeking expedited review), Valley Telephone Company Petition for Waiver (Apr. 11, 1988), Valley Telephone Company Request For Expedited Treatment (May 25, 1988).

[5] *See* Petition For Declaratory Ruling or Waiver of the Inland Telephone Company, Midland Telephone Company, Lakeside Telephone Company, and Prairie Telephone Company (Inland Petition)(July 31, 1987). The four companies are collectively referred to hereafter as the "Inland Companies."

[6] *Id.*

[7] Inland Petition for Relief (Dec. 31, 1987). The Inland Companies also filed a Supplement To Petition For Declaratory Ruling Or Waiver (Mar. 1, 1988). These petitions are discussed separately at Section III, *infra*.

[8] *See* note 4, *supra*.

[9] *Id.*

[10] NECA Petition For Waiver (Jan. 30, 1987)(NECA Petition) at 3.

[11] *See* MTS and WATS Market Structure: Average Schedule Companies, *Memorandum Opinion and Order*, 3 FCC Rcd 834, 842 at n. 86 (*Reconsideration Order*) ; MTS and WATS Market Structure, *Memorandum Opinion and Order*, CC Docket No. 78-72, Phase I, FCC 83-509 (Nov. 14, 1983)(*Initial Average Schedule Acceptance Order*).

[12] NECA Petition at 3.

[13] *Id.*

[14] *Id.* at 4, n. 8.

[15] *See Reconsideration Order* at n. 86; NECA Petition at 3, n.5. No party that filed comments on NECA's petition contested the need for a limitation on the size of the exchange carriers to prevent settlement fluctuations and preclude nationwide rate changes. *See, e.g.*, Comments of the United States Telephone Association at 2 (NECA proposes to limit the size of the companies eligible for the option. This will minimize any average schedule settlement fluctuations as well as any potential rate changes and would prevent a material increase in the total NECA pool revenue requirement); NTCA Comments, *passim*.

[16] Letter from Mr. John A. Grieg, NECA Director Tariff and Regulatory Matters, to the Secretary, Federal Communications Commission (Aug. 21, 1987).

[17] NECA stated in its petition that it estimated that:

> of 467 cost companies below 5000 access lines, 165 would realize settlement increases if they were to elect to convert to average schedules. If all of these 165 companies were to convert, and no companies which would experience settlement decreases were to elect the conversion option, 1988 revenue requirements would increase by an estimated maximum of12.55M. This additional revenue requirement equates to less than 2/10ths of 1% increase in total annual NECA pool revenues. Further, subsequent updates of the average schedule formulas would recognize the lower costs of these companies and offset this initial increase in revenue requirements through lower formula settlement levels. Long-term cost savings would also be realized through reduced administrative burdens including elimination of the need for separations studies.
>
> NECA Petition at 3, n.6.

[18] NECA now states that the "reference in the first sentence of footnote 6 to '467 cost companies below 5,000 access lines' represents all 467 study areas which at that time had less than 5,000 access lines, irrespective of company affiliation. Similarly, the reference in this footnote to § 165 companies' also represents 165 study areas irrespective of company affiliation." Letter from James W. Frame, NECA Director - Tariff & Regulatory Matters, to H. Walker Feaster, FCC Secretary (July 20, 1988.)

[19] We exclude from this option those exchange carriers, if any, that, in response to the previous waiver opportunity that expired on July 31, 1987, elected average schedule status and have since converted to cost study status. *See* NECA's Proposed Waiver of Section 69.605(c) of the Commission's Rules, *Memorandum Opinion and Order*, 2 FCC Rcd 3960 at para. 5.

[20] The question of whether the affiliation of an average schedule LEC with one or more cost companies should affect its ability to continue in average schedule status is pending before the Commission on remand from the United States Court of Appeals for the District of Columbia Circuit. *ALLTEL v. FCC*, 838 F.2d 551, 563 (D.C. Cir. 1988). Our decision in this order to grant cost companies with fewer than 5,000 access lines an opportunity to elect to settle under the average schedules, regardless of their affiliation status, does not, of course, preclude a decision that affiliation with cost companies should affect LEC eligibility for average schedule status.

[21] NECA Petition at 3, n.6.

[22] *Id.*

[23] *Inland Petition, passim*. The petitioners are located in Illinois. Inland has 7 exchanges and 3,977 access lines; Midland has 11 exchanges and 3,899 access lines; Lakeside has 2 exchanges and 762 access lines; and Prairie has 2 exchanges and 927 access lines. *Id.* at 3.

[24] *Id.* at 1-2, 8.

[25] *Id.* at 3, 8.

[26] *Id.*

[27] *Id.* at 3. *See also id.* at 10-11, Attachment I.

[28] *Id.* at 3, 9, Attachment I.

[29] *Id.* at 8.

[30] *Id.*

[31] *Id.* at 9.

[32] *Id.*

[33] *Id.*

[34] Inland Companies Petition for Relief at 1-10.

[35] Inland Petition at 1.

[36] As a consequence, the Inland Companies are not entitled to a recomputation of their interstate settlements from January 1, 1988.

[37] Inland Petition at 1. *See id.* at 2, 7-9, Attachment I.

[38] *Id.* at 9

[39] *See* 47 C.F.R. § 32.9000.

[40] The Inland Companies quote 47 C.F.R. § 31.01-3(j)(1986) at page 8 of their petition. The definition of control cited by Inland was recodified at 47 C.F.R. § 32.9000 (1987). We note that the definition, as quoted by Inland, omits the words "common directors, officers, or stockholders," which is contained in both rule sections. Although we regard the presence of common directors, officers, and stockholders to be relevant to a finding of control in this case, we have no reason to believe that this omission (which was not indicated by the use of an ellipsis) was other than inadvertent. Nevertheless, we remind parties that care should be taken to ensure that both the facts asserted and the legal citations and arguments in their pleadings should be accurate and well-founded and that deliberately false or misleading statements may lead to the imposition of appropriate sanctions pursuant to Section 1.24(a)(3) and (4) of the Commission's rules, 47 C.F.R. § 1.24(a)(3), (4).

[41] The other factors cited by the petitioners (*see supra* para. 9) are frequently encountered among affiliated exchange carriers and are not necessarily associated with, nor do they reliably indicate, unaffiliated corporate relationships. For example, it is not unusual if affiliated exchange carriers: (1) do not pool revenues or profits; (2) perform separate cost studies; (3) file individual tariffs; (4) separately allocate joint costs; (5) keep the financial affairs and billings of each company separate; (6) do not have overlapping exchange areas; (7) own and operate their own plant and equipment; (8) keep separate books of account. *See* Inland Petition at 1-3, 8-11, Attachment I.

[42] Inland Petition at Attachment I.

[43] *Id.* Other cross-officers also appear among all companies. For example, Dwight E. Zimmerman serves as president or vice-president in each of the four companies, while Tony Bruce functions as a junior officer for all four companies. *Id.*

[44] *Id.*

[45] *Id.* at 9.

[46] Of the 31 persons employed by the Inland Companies, 20 are pooled among the companies on a shared basis. *Id.* at 10-11.

[47] Of the 20 pooled employees, the time of 17 employees is allocated on an access line basis while, for the other three, time is allocated on the basis of the actual hours each employee spends working for each company. *Id.*

[48] The petitioners note that resources and personnel have been combined to achieve operational efficiencies and cost savings among the companies. Inland Petition at 9-11. We conclude, however, that the companies' desire for, and achievement of, operational efficiencies and cost savings is not inconsistent with our finding that the companies are affiliated under the standards reflected in the Commission's rules. *See id.* at 9-10.

[49] *Id.* at 8.

[50] *See id.* at 8-11, 14, Attachment I.

[51] Letter from Richard A. Straub, Group Manager - Docket Management to Kent Nilsson, Common Carrier Bureau, Federal Communications Commission (Apr. 4, 1988).

[52] *See* 47 C.F.R. § 69.602(a),(f)(1987).

[53] *See id. Compare* Letter from L. Andrew Tollin, Counsel for the Inland Companies to H. Walker Feaster III, Acting Secretary, Federal Communications Commission (Apr. 21, 1988) at 2 *with* 47 C.F.R. §§ 69.602(a),(f), 32.9000 (1987).

[54] Inland Petition at 8 ["Given the breath of the rule, virtually any relationship between companies (regardless of how minimal) could render them affiliates of each other"].

[55] Letter from L. Andrew Tollin, Counsel for the petitioners, to H. Walker Feaster III, Acting Secretary, Federal Communications Commission (Apr. 21, 1988) at 2.

[56] The Inland Companies also contend on policy and legal grounds that, even if they are deemed to be affiliated, they should be permitted to convert to average schedule status. Inland Companies Petition For Relief at 1; Inland Petition at 2-15; Inland Companies' Supplement to Petition For Declaratory Ruling or Waiver (Mar. 1, 1988). Because our decision to permit affiliated cost companies that each have 5,000 or fewer access lines to elect average schedule status, *supra* at para. 6, renders these contentions moot, we need not address them here.

[57] Inland Petition at 8.

[58] *See* para. 6 *supra* and paras. 20, 21, *infra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

CASTLE COMMUNICATIONS, INC. File No. BMPCT-870630KG

For Extension of Time to Construct
Station KCCD(TV), Tonopah, Nevada

ORDER

Adopted: September 29, 1988; Released: October 13, 1988

By the Commission:

1. The Commission has before it for consideration: (a) the August 31, 1987, action of the Chief, Video Services Division, denying the above-captioned application of Castle Communications, Inc. (Castle) for an extension of time within which to construct Station KCCD(TV), Channel 9, Tonopah, Nevada, cancelling its construction permit, and deleting the call sign; (b) the November 17, 1987, action of the Chief, Video Services Division, denying reconsideration of that action; and (c) Castle's December 21, 1987, application for review of those actions.

2. We have reviewed the actions of the Chief, Video Services Division, and we conclude that the matter was fairly considered and properly decided under applicable precedent. Accordingly, IT IS ORDERED, That, pursuant to Section 1.115(g) of the Commission's Rules, Castle's application for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs — AAD 7-1668

MEMORANDUM OPINION AND ORDER

Adopted: September 29, 1988; Released: October 13, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In the *Joint Cost Order*,[1] the Commission required certain subject carriers, including the Ameritech Operating Companies (Ameritech),[2] to file manuals for separating the costs of regulated telecommunications services from the costs of nonregulated activities. In response to this requirement, Ameritech filed a cost allocation manual on July 27, 1987. That manual described Ameritech's nonregulated activities, listed the activities Ameritech proposed to treat as incidental activities, and provided information on Ameritech's affiliate transactions, employee time reporting procedures, and cost apportionment methods.

2. We reviewed that manual in the *Ameritech Order* [3] and found that certain areas of the manual required clarification or revision. Despite these problem areas, we conditionally approved Ameritech's manual. We determined that the manual provided adequate assurances against the misallocation of costs and revenues between regulated and nonregulated activities to permit its implementation on January 1, 1988. We required, however, that Ameritech submit revisions addressing each of the specified problem areas. We stated that these revisions would be subject to public comment and our review, and that we would take all appropriate action, including the prescription of specific apportionment procedures, in the event we disapproved any part of the revised manual.[4]

3. Ameritech submitted its revisions on March 30, 1988, and further revised its manual on June 30, 1988. The March 30 revisions provide additional information regarding the problem areas identified in the *Ameritech Order*, and, according to Ameritech, comply fully with that Order.[5] MCI Telecommunications Corporation (MCI) and the Public Utilities Commission of Ohio (PUCO) have commented on these revisions, and Ameritech has replied. The June 30 revisions address a limited number of areas, including certain apportionment methodologies. No party commented on these revisions.

4. After reviewing the pleadings and the contents of Ameritech's revised manual, we find, subject to certain exceptions, that it is consistent with the Commission's requirements for cost allocation manuals and properly implements the *Ameritech Order*. Before turning to these exceptions, we wish to emphasize that this Order does not discuss the many areas that no party has asked us to address in which Ameritech has complied fully with Commission requirements and the *Ameritech Order*. We also wish to emphasize that the exceptions are very limited in relation to the manual as a whole. Accordingly, we approve Ameritech's revised manual including the March 30 and June 30, 1988 revisions, subject to the filing of additional information and revisions specified herein. This filing shall be made no later than December 31, 1988.

5. In the *Ameritech Order*, we stated that Ameritech would be required to make all revisions we approved or ordered effective as of January 1, 1988.[6] We recognize that such retroactivity may not be reasonably practicable with regard to certain additional changes we require in this Order. We direct Ameritech to make all such changes effective January 1, 1988 to the maximum extent possible, and to identify in the transmittal to its filing which changes, if any, it cannot reasonably implement as of January 1, 1988, and the justification for not implementing the changes retroactively.[7]

II. DISCUSSION

A. *Overall Sufficiency of the Revised Manual*

6. Under the *Joint Cost Order*, each cost allocation manual must describe the nonregulated activities, incidental activities, affiliate transactions, employee time reporting procedures, and cost apportionment methods of the telephone operating companies that will apply it. In the *Ameritech Order*, we required Ameritech to provide additional, and, in certain instances, corrected information regarding each of these areas. We were particularly concerned with the methods Ameritech proposed for assigning costs to cost pools and for apportioning cost pools between regulated and nonregulated activities. We found those methods important because the costing system established in the *Joint Cost Order* requires telephone companies to divide the accounts and subaccounts listed in the Commission's Uniform System of Accounts (USOA) into homogeneous cost categories or pools that can be directly assigned to, directly or indirectly attributed to, or allocated between regulated and nonregulated activities on a cost-causative basis.[8]

7. Although we ordered Ameritech to provide additional information regarding its cost pool assignment and apportionment methods, we did not require Ameritech to identify and justify the reporting codes, accounting records, and records of charges to accounts that support those methods. We determined, despite MCI's argument to the contrary, that such information would not be necessary for us to evaluate Ameritech's overall apportionment system.[9]

8. In its revised manual, Ameritech provides extensive additional information regarding its cost pool assignment and apportionment methods. While MCI recognizes that this information makes the manual more understandable, it argues that many of Ameritech's cost pool assignment and apportionment methods remain vague.[10] MCI argues that we must require Ameritech to provide more thorough descriptions of its cost pool assignment and apportionment methods in order to evaluate the manual properly and that we should require that information at this time. MCI claims that Ameritech's entire costing process continues to rely on the review and analyses of fundamental accounting records and reporting codes that the manual neither fully explains nor justifies. MCI contends that Ameritech should

be required to describe these records and codes more precisely, and to justify using them as the basis for apportioning costs between regulated and nonregulated activities.[11]

9. MCI argues further that we should clarify the procedures we intend to employ in auditing and overseeing the cost allocation manual process. In MCI's view, these procedures should make clear that telephone companies must make their fundamental cost data available to their independent auditors and to the Commission, and should specify how the Commission intends to review and test that data. In addition, MCI maintains that we should state the processes we will employ to review independent auditor reports and to obtain any relevant cost data that the independent auditors do not review.[12]

10. In response to MCI's charges of insufficient detail, Ameritech notes that the Commission has already found in the *Ameritech Order* that the original manual was adequate in most respects, and it asserts that the revised manual adequately addresses the remaining problem areas. Furthermore, Ameritech contends, the Commission and the independent auditors will have complete access to extensive information under existing requirements and it is unnecessary to include that level of detail in the cost manual.[13] Ameritech also argues that MCI's repeated requests for more detailed explanations of underlying records, reporting codes and analyses reflect MCI's refusal to accept the balance struck by the Commission in the *Joint Cost Order* between precision and feasibility in cost allocation methodology. Similarly, in response to MCI's claim that the Commission should specify how it will monitor compliance with the cost allocation requirements, Ameritech states that these questions have already been resolved in the *Joint Cost Order* and the *Reconsideration Order* and are inappropriate in the instant proceeding.[14]

11. We find that Ameritech's revised manual generally complies with the *Ameritech Order*. In that Order, we declined to require Ameritech to identify and justify the reporting codes, accounting records, and records of charges to accounts that support its cost pool assignment and apportionment methods. We found that requiring Ameritech to describe those methods in greater detail would be sufficient to eliminate any ambiguities and deficiencies in the manual.[15]

12. Our review of the manual confirms that it now contains sufficient information for us to evaluate virtually all of Ameritech's cost pool assignment and apportionment methods. We required additional information regarding those methods for two reasons. First, we wanted to ensure that the Commission, Ameritech and the independent auditors would share a common understanding of Ameritech's manual. We are satisfied that the revised manual achieves this purpose. A more detailed manual would not increase our ability or the independent auditors' ability to verify proper implementation of the manual.[16]

13. Our second reason for requiring additional information regarding Ameritech's cost pool assignment and apportionment methods was to enable us to review the substantive merit of those methods that Ameritech had not adequately explained. In virtually all instances, the revised manual contains sufficient information to let us perform this review. As discussed below, we require additional information regarding a few of Ameritech's assignment and apportionment methods. However, the Commission has determined that cost allocation manuals need not include the reporting codes, accounting records, analytical steps, and other procedures that Ameritech has developed to implement its apportionment methods.[17] Accordingly, we reject MCI's request that we require Ameritech to provide an additional level of detail regarding its overall cost pool assignment and apportionment methods.

14. We agree with MCI, however, that the data gathering procedures and documentation underlying the apportionment procedures set forth in the manual are critical in any decision as to the reasonableness of the amounts assigned or allocated to nonregulated activities. However, that does not justify inclusion of such material in the manual to the extent that the resulting document is so cumbersome as to obscure its primary purpose -- the comprehensive description of how the carrier complies with the Commission's cost apportionment policies and rules.[18] It may well be that our audits or our review of the independent auditor reports will reveal problems not with the apportionment procedures themselves, but with the underlying data collection and recording procedures. If this is the case, we will require revisions in the apportionment results and, if necessary, disallow for ratemaking purposes those costs that have been improperly included in the carrier's regulated accounts.

15. We also decline to specify the precise procedures we will employ in auditing and overseeing the cost allocation manual implementation process. While we intend to examine cost allocation and other accounting procedures in the course of our regular carrier audits and our review of independent auditor reports,[19] the procedures which we will employ will be tailored to the circumstances we encounter. We emphasize, however, that telephone companies must retain a complete audit trail of all cost allocations and affiliate transactions, and must make that information, as well as the independent audit and all related data and workpapers, available to the Commission.[20] We will, of course, require further changes to the manual in the event our own audits or our review of the independent auditor reports reveal a need for such action.[21]

B. *Affiliate Transactions*

16. *Sales Agency*. In the *Ameritech Order*, we required Ameritech to supplement the affiliate transactions section of its initial manual to specify in more detail the nature, frequency and terms of its affiliate transactions.[22] Ameritech has generally complied with this requirement.[23] In one instance, however, this additional information reveals potential problem regarding the terms of marketing services provided to Wisconsin Bell by two Ameritech subsidiaries.

17. Sales and marketing services are normally furnished to Ameritech operating companies by their "Communications Sales Subsidiaries (ComSubs)." Ameritech states that the ComSubs ordinarily do not perform these services for any nonaffiliated entities and that, in accordance with the Commission's affiliate transaction rules,[24] the resulting absence of prevailing prices compels the telephone Companies to record the sales and marketing services at the ComSubs' fully allocated costs.[25] Wisconsin Bell generally obtains its marketing support at fully allocated costs from its own particular ComSub, Wisconsin Bell Communications, and from the region-wide ComSub, Ameritech Communications, Inc. For Wisconsin Bell's "intrastate" Centrex service, however, Ameritech states

that the Wisconsin Public Service Commission (PSC) follows different affiliate transaction statutory provisions for "intrastate ratemaking purposes."[26] Therefore, Ameritech proposes that these ComSubs provide Centrex sales and marketing services at commission levels paid by Wisconsin Bell to third-party sales agents, pursuant to the requirements and the approval of the Wisconsin PSC.[27]

18. We do not wish to intrude into the intrastate regulatory affairs of Wisconsin Bell vis-a-vis the Wisconsin PSC. However, in the *Joint Cost Order* the Commission stated that in this general area, the Commission's rules must be the basis for developing a carrier's core books of account and for identifying its regulated investment, expenses and revenues to be apportioned pursuant to the jurisdictional separations process and to be used in calculating interstate rates.[28] The Commission added, however, that once these phases of the process are completed, the state jurisdiction is free to allocate the resulting intrastate regulated and nonregulated costs in its own ratemaking proceedings as it sees fit.[29]

19. Applying these principles to the instant question, we find that the sales and marketing services Wisconsin Bell obtains from its ComSubs for intrastate Centrex service must be recorded at the ComSubs' fully allocated costs, rather than at the commission levels paid by Wisconsin Bell to third- party agents.[30] These fully allocated costs will be apportioned between regulated and nonregulated activities, and the regulated portion of these costs will be used in the jurisdictional separations process and for interstate ratemaking purposes. This is necessary because the ComSubs do not provide these sales functions to any nonaffiliated entities and there is no other applicable exception to our cost rule in this instance. After the jurisdictional separations stage, however, the state ratemaking treatment afforded to the intrastate portion of Wisconsin Bell's costs will be the prerogative of the Wisconsin PSC.[31] We direct Ameritech to amend its manual as necessary to reflect this ruling.

20. *Supplies and Equipment as Assets*. Another problem which emerges from Ameritech's revisions to clarify the nature, frequency and terms of its affiliate transactions concerns the entries for Ameritech Mobile Communications, Inc. (Ameritech Mobile) and Ameritech Communications, Inc. (Ameritech Communications).[32] The manual lists the provision of equipment and supplies as services provided by these two affiliates to Ameritech operating companies and states that there are no asset transfers from these affiliates to the operating companies. However, equipment and supplies are assets whose transfer is subject to the Commission's rules for asset transfers. Since Section 32.27 of the Commission's Rules[33] treats services and asset transfers quite differently, we direct Ameritech to clarify the nature of these transactions. If Ameritech Mobile and Ameritech Communications are providing the operating companies with purchasing services for equipment and supplies the operating companies obtain from third parties, Ameritech may continue to list these transactions as services. If, however, Ameritech Mobile and Ameritech Communications are providing the operating companies with equipment from Ameritech Mobile's and Ameritech Communication's own inventories of such items, Ameritech must list these transactions as asset transfers and specify terms that comply with the Commission's rules regarding such transfers.

C. *Official Communications Services*

21. In the cost apportionment section of its initial manual, Ameritech proposed to provide official communications toll service to its regulated and nonregulated entities at cost. It also proposed to create an official communications cost pool in Account 6728 - Other general and administrative, to be apportioned on the basis of relative salaries and wages.[34] Ameritech did not, however, include any corresponding entry on official communications service in the affiliate transactions section of its initial manual. In the *Ameritech Order*, we directed Ameritech to include its intercompany official services in the affiliate transactions section and to use tariffed rates rather than cost whenever possible, in accordance with the Commission's cost allocation regulations.[35] In its revised manual, Ameritech has responded to these requirements with a number of amendments. PUCO argues, however, that the revisions employ inappropriate allocators and fail to accord the requisite priority for direct assignment over attribution.[36] In its reply, Ameritech has submitted a few additional clarifications but otherwise defends its basic methodology.[37] We conclude that the treatment of official communications in Ameritech's manual, as most recently revised, is adequate.

22. The cost apportionment section of Ameritech's initial manual provided that regulated and nonregulated entities could use its official communications toll network at cost, as derived from the general cost allocation methodology of the manual.[38] In addition, it provided that one of the cost pools for Account 6728, "official communications," would be indirectly attributed to regulated and nonregulated activities in proportion to total company wages and salaries less direct construction, installation and repair wages and salaries.[39] There was no mention of official communications in the affiliate transactions section of the initial manual.

23. In the *Ameritech Order*, we found that those corporate network services which are provided to affiliates are necessarily affiliate transactions and should be set forth as such in that section of the revised manual.[40] In addition, we concluded that, pursuant to Section 32.27(d) of the Commission's Rules,[41] these interaffiliate services must be provided at tariffed rates to the extent such rates are available.[42] Similarly, we found that, pursuant to Section 64.901 of the Commission's Rules,[43] the intracompany official communications cost pool in Account 6728 must be developed from tariffed charges for services offered under tariff.[44]

24. Ameritech's revised manual contains a number of additions and corrections in response to our *Ameritech Order*. First, it has entirely new entries in the affiliate transactions section for the provision of exchange, intraLATA toll, and access services, all at tariffed rates, and for the provision of interLATA toll services at cost.[45] Second, it has a revised entry in the intracompany cost apportionment section covering both intraLATA and interLATA services.[46] The intracompany, intraLATA costs are to be computed by the average cost per access line at imputed tariffed rates times the number of lines. The resulting amounts are to be assigned to the official communications cost pool of Account 6728 and then apportioned by relative wages and salaries. The intracompany, interLATA costs are to be determined from the fully distributed costs of Ameritech's dedicated facilities and from the actual costs of its leased facilities, as obtained at tariffed rates from interexchange carriers. The resulting

amounts are also to be assigned to the official communications cost pool of Account 6728 and then apportioned by relative wages and salaries.[47]

25. In its comments, PUCO challenges Ameritech's revisions on official communications in several respects, and Ameritech has replied with both argument and further revisions. We shall now address each of these issues *seriatim*. First, PUCO claims that the new entry in the affiliate transactions section of the manual is vague and unsystematic.[48] In response, Ameritech has expanded and clarified these provisions.[49] We find that Ameritech has substantially improved its manual in this regard and has satisfied the requirements we set forth in the *Ameritech Order*.

26. Next, PUCO rejects Ameritech's revised intracompany, intraLATA cost apportionment methodology, insofar as it is based on average costs at imputed tariffed rates, on the grounds that it is an inferior basis for allocation and a violation of Section 64.901 of the Commission's Rules, 47 C.F.R. § 64.901.[50] As an alternative methodology, PUCO recommends that actual tariffed rates for intraLATA access and usage should be directly assigned to the appropriate intracompany activities by identifying whether each line in question is devoted exclusively to a regulated or nonregulated activity. PUCO concedes, however, that some intracompany lines will be jointly used: in such cases, it expresses qualified support for allocation according to relative wages and salaries and calls for a study by Ameritech on the reasonableness of this allocator.[51]

27. Ameritech replies that it must employ "imputed costs" at actual tariffed rates and must employ "average costs" of official usage because it has no other established mechanism precisely to recognize and measure the actual traffic which its operating companies provide to themselves. In addition, it claims that the costs of installing such a mechanism would be too great.[52] Ameritech denies that intracompany provision of intraLATA toll can be directly assigned for most lines. On the contrary, it maintains, the necessary standard toll records are not available in every case. More importantly, it continues, regulated and nonregulated activities are generally commingled and, therefore, "company official communications are a non-separable common support function which supports both regulated and nonregulated activities."[53] Ameritech then observes that the cost allocation method it has proposed is virtually identical with the methodology that the Commission suggested in its conditional approval orders on the manuals of some of the other regional companies, and it quotes a long excerpt from the *U S West Order*.[54]

28. We find that Ameritech's revised methodology for intracompany, intraLATA official communications service is basically sound. Ameritech's assertion that it does not already have in place the mechanisms which could yield more precise information on its internally provided service is credible because Ameritech has never before encountered the kind of apportionment requirements applicable to this service which we are imposing on it in this proceeding. In addition, we do not believe that the increase in precision would justify the cost of developing and implementing these mechanisms. Thus it is reasonable for Ameritech to resort to reasonable approximations and averages to apportion these costs. We also find it credible that direct assignment would be difficult due to the prevalence of joint regulated and nonregulated activities over the official network.

29. It is for these reasons, as well as others, that we proposed the method for other regional holding companies which Ameritech has cited and, to a large extent, has used as a model. We described this methodology most comprehensively in the *U S West Order*, as follows:

> One method we would consider acceptable is for U S West to calculate the amount it would have paid had all of its internal communications been obtained under tariff. The "actual use" measures proposed in U S West's manual --current access line counts and periodic state-wide usage studies --would assist U S West in making this determination. An allocator reflecting total company involvement in nonregulated activities, such as total company wages and salaries, could then be applied to the total cost to derive an imputed nonregulated cost for telephone service under tariff . . . . Furthermore, any internal telephone service that could be identified as dedicated to regulated or nonregulated activities could be directly assigned so that the calculations we described would only have to be performed in jointly-used plant.[55]

30. Ameritech's proposal here is clearly within the bounds of the foregoing recommendation. Although we did recognize there the possibility of direct assignment in some instances, we find credible Ameritech's assertion that the benefits of installing mechanisms to accomplish this would not be cost effective and that approximations based on studies and other indirect methods are adequate.

31. Finally, with regard to untariffed interLATA official communications service, PUCO concedes that some form of cost apportionment will be necessary.[56] Accordingly, it supports Ameritech's proposed methodology using fully distributed cost and actual measured usage for intercompany provision of such service. It then states that this same methodology could be extended to intracompany, interLATA service. At the same time, it suggests that the direct assignment it advanced in the intraLATA, intracompany context could be adopted here, as well.[57] Thus it is contending that direct assignment and usage should be preferred over wages and salaries to apportion the costs.

32. We reject these proposals for interLATA official communications for the same reasons as just stated in the intraLATA context. Moreover, since Ameritech's method is consistent with the method we suggested in the *U S West Order*, we decline to require Ameritech to study alternative apportionment methods for these costs. Accordingly, we approve Ameritech's proposals, as most recently revised, for official communications.

D. *Apportionment Proposals*

33. *Service Center Activity Study and Surveys*. In the cost allocation analysis section and the time reporting section of its initial manual, Ameritech described certain surveys and time and motion studies that would be conducted to determine the amounts of time its service center employees spend on regulated and nonregulated activities, respectively. This information would then be used, it stated, in the apportionment of various cost pools in Account 6612 - Sales and in Account 6623 - Customer Services.[58] In the *Ameritech Order*, we required Ameritech to elaborate on the criteria for selecting a study period and to clarify whether the surveys would employ sampling techniques

with accepted statistical methods.[59] Ameritech's response in the revised manual states only that the study periods will be chosen by "management judgment" and that "time slice sampling techniques" will be used.[60] This is an inadequate answer. Ameritech must be sufficiently specific to enable us to determine whether its study methodology is valid and to enable an independent auditor to determine whether Ameritech has applied that methodology correctly. Accordingly, Ameritech must provide a more detailed description of this matter.

34. *Account 2004 - Telephone Plant Under Construction - Long Term.* In the *Ameritech Order*, we stated that Ameritech must include in its revised manual certain accounts which are necessary for purposes of the *Automated Reporting Requirements* proceeding[61] but which were excluded from the original list of such additional accounts.[62] One of these accounts was Account 2004 - Telecommunications Plant Under Construction - Long Term. In its initial manual, Ameritech had included this account in the cost apportionment matrix section, apparently in the belief that at least some portion of it is a regulated activity.[63] In its revised manual, Ameritech lists the title of Account 2004 in the matrix section, with a comment that the account has been removed from the manual.[64] In Exhibit A to the cover letter for the revised manual, Ameritech states that Account 2004, among others, has been removed because it is not used in interstate ratemaking and an apportionment would therefore serve no purpose.

35. In its comments, PUCO argues that Account 2004 ought to be restored to the manual, accompanied by a comment explaining which portion, if any, is being included in the interstate rate base.[65] In its reply comments, Ameritech answers that the purpose of the *Joint Cost Order* and its attendant regulations is to segregate nonregulated costs from regulated ones, and that inclusion in the manual of costs which are in no way regulated would be pointless.[66]

36. Ameritech has correctly cited regulations and decisions of the Commission which exclude all amounts recorded in Account 2004 from the interstate rate base, [67] and we agree that requiring Ameritech to apportion this account between regulated and nonregulated activities would serve no useful purpose. Therefore, we reject PUCO's argument that this account be restored to the manual.

37. *Account 2111 - Land.* In its revised manual, Ameritech proposes to create equal access, network reconfiguration, and central office cost pools within this account. The equal access and network reconfiguration cost pools would be directly assigned to regulated activities. While this proposal is entirely proper, Ameritech also proposes to apportion the central office cost pool between regulated and nonregulated activities in proportion to its relative investment in central office equipment, including investment in equal access and network reconfiguration investment.[68] We believe that the inclusion of equal access and network reconfiguration investment in this apportionment factor, in combination with the direct assignment to regulated activities of the equal access and network reconfiguration cost pools within Account 2111, will result in an overallocation of costs to nonregulated activities. Accordingly, we require Ameritech to amend its manual to specify that equal access and network reconfiguration costs will be excluded from the calculation of the apportionment factor for its central office cost pool within this account.

38. *Account 2121 - Buildings.* In its revised manual, Ameritech proposes to assign its building investment to cost pools "based on the predominant use of productive space."[69] We believe that this method is insufficiently cost-causative since it would ignore any building usage that is not predominant. Ameritech shall amend its manual to specify that its building investment will be assigned to cost pools in accordance with the actual usage of each building.

39. *Account 5001 - Basic Area Revenue through Account 5270 - Carrier Billing and Collection Revenue, and Account 7991 - Other Nonregulated Revenues.* In its initial manual, Ameritech had no entries for any of these accounts. However, in the *Ameritech Order*, we required Ameritech to include Accounts 5001 through 5270 in its manual.[70] In the apportionment matrix section of its revised manual, Ameritech has now set forth a single entry for the entire range of operating revenue accounts, entitled "5001 through 5270 Operating Revenues."[71] Ameritech proposes to assign these aggregated accounts directly to regulated activities.[72] In its comments, PUCO contends that all these operating revenue accounts should be contained in the manual as specific line items because the *Automated Reporting Requirements Order* so requires.[73] Ameritech replies that all of the 5000 operating revenue accounts are, by Part 32 design, regulated accounts, while nonregulated revenues are all recorded in Accounts 7990 - Nonregulated net income or 7991 - Other nonregulated revenues. It concludes, accordingly, that a separate line item for each regulated operating account would be entirely repetitious with respect to the separation of regulated from nonregulated costs.[74]

40. The criteria for the inclusion and proper form of additional entries in this context are based on the regulatory purposes involved. PUCO has advanced no persuasive reason why there should be individual line items in the manual for all operating revenue accounts. The Automated Reporting Requirements procedure does not necessitate this insofar as its purposes relate to the cost allocation manual. Furthermore, such disaggregation would be very redundant: the cost apportionment matrix would be burdened with virtually identical entries in every column for each line item, and this burden would extend to Ameritech's routine application of those procedures. If PUCO needs revenue data at this level of disaggregation for its own regulatory needs, it may obtain that data from Ameritech through its own reporting procedures, including access to information that Ameritech may have compiled for some interstate purposes of this Commission. Since Ameritech is correct in directly assigning the amounts recorded in Accounts 5001 through 5270 to regulated activities, we conclude that a specific line item entries for each of these accounts is unnecessary. However, since Ameritech will be apportioning its uncollectible revenue for telecommunications operations in proportion to its relative telecommunications revenue and its other uncollectible revenue in proportion to its relative other revenue,[75] we require Ameritech to disaggregate Accounts 5001 through 5270 into two revenue groupings. The first grouping shall consist of the revenues from Ameritech's telecommunications operations that are recorded in those

accounts. The second grouping shall consist of the revenues from Ameritech's other operations that are recorded in those accounts.

41. Although Ameritech's practice of recording all nonregulated revenues in Accounts 7990 and 7991 is consistent with the Commission's accounting rules, Account 7991 includes revenues from nonregulated activities that involve the joint or common use of assets in the provision of regulated and nonregulated products and services.[76] It is essential to our monitoring efforts that the cost manual list any account in which Ameritech records revenues derived from nonregulated activities to which the manual apportions costs. Ameritech shall amend its manual accordingly.

42. *Account 5301 - Uncollectible Revenues - Telecommunications and Account 5302 - Uncollectible Revenues - Other.* In the cost apportionment analysis section of its initial manual, Ameritech stated that, with one general exception, all of its subaccounts within the two uncollectible accounts, Account 5301 for telecommunications operations and Account 5302 for other operations, respectively, would be directly assigned to regulated activities. The exception, comprised of end-user uncollectibles for both telecommunications and other operations, would be allocated to regulated or nonregulated activities based on the relative proportions of such revenues to total revenues (including those recorded in Account 7991).[77]

43. In its comments on the initial manual, the Office of Consumers' Counsel of Ohio challenged the apportionment of end-user uncollectibles by revenues.[78] Ameritech replied, *inter alia*, that use of total revenues as an allocator was justified because end-user uncollectibles usually arise from failures to pay joint bills for regulated and nonregulated services. Ameritech added that it would directly assign these revenues whenever they were separately billed or identified.[79]

44. In the *Ameritech Order*, we stated that we were uncertain as to the relationship between Ameritech's booked uncollectibles and its mix of services and that we would therefore require only clarification, rather than amendment, of its apportionment methodology.[80] In particular, we requested that Ameritech explain how direct assignment of any of its uncollectibles was possible. Moreover, we required that uncollectibles for telecommunications operations and for other operations, respectively, be apportioned separately by the corresponding proportion of regulated and nonregulated revenues for each of these two types of operations.[81]

45. In its revised manual, Ameritech completely abandons direct assignment for any of its uncollectibles subaccounts, and it revises its treatment of the two overall accounts so that uncollectibles for telecommunications and for other operations are to be apportioned separately.[82]

46. In its Comments, PUCO charges that Ameritech failed to comply with the Commission's order to explain how direct assignment is possible and that it removed direct assignment from its manual without being ordered to do so. Accordingly, PUCO contends, Ameritech should be directed to reinstate direct assignment as the preferred apportionment method and to explain how direct assignment is possible.[83] Ameritech responds that its prior attempt to apportion uncollectibles by direct assignment was "unwieldy" because uncollectibles generally result from joint bills.[84] Further, it claims, the method in its revised manual is modeled on one that the Commission itself prescribed for Bell Atlantic, U S West, and Nevada Bell and Pacific Bell. In particular, Ameritech asserts, this method specifically calls for allocation of the entire uncollectibles accounts, without any direct assignment before attribution.[85]

47. Ameritech is essentially correct that we mandated methodologies similar to its revised one in the cases of other regional holding companies. In our order conditionally approving Bell Atlantic's cost manual, for example, we stated:

> Account 5301 reflects uncollectibles from telecommunications activities, while Account 5302 reflects uncollectibles from all "other" activities. Bell Atlantic has apportioned both based on gross revenues. We believe the accounts should be apportioned based on corresponding revenue accounts. Thus, for example, telecommunications revenues must form the basis for allocation of telecommunications uncollectibles. Bell Atlantic must therefore amend its manual.[86]

48. Our objective in requiring this methodology was to obtain individual allocators derived from revenues for telecommunications services and for other services, respectively. Since Ameritech's revised methodology implements that objective, we approve it.

49. *Accounts 6611 - Product Management, 6612 - Sales, and 6613 - Product Advertising.* In its initial manual, Ameritech created shared services cost pools within each of these accounts. Although these cost pools were restricted to expenses that Ameritech incurs in connection with its packet switching network, including the nonregulated protocol conversion applications provided in conjunction with that network, Ameritech proposed to use the marketing allocator to apportion the pools between regulated and nonregulated activities. Since the marketing allocator is only meaningful if it is based on a majority of a carrier's marketing expenses, we required Ameritech to justify this use of the marketing allocator and to explain whether a more cost-causative apportionment method could be used.[87] In its revised manual, Ameritech again proposes to use the marketing allocator for these shared services cost pools. Ameritech states that the costs in these pools are related to its packet switching network and "are so integrated that the regulated and nonregulated components cannot be separated utilizing direct or indirect attribution methods."[88]

50. We find Ameritech's statement insufficient to justify use of the marketing allocator for product management, sales, and product advertising expenses related to Ameritech's packet switching network. The services provided through that network consist of nonregulated protocol conversion applications as well as regulated packet switching services.[89] We believe that the product management, sales, and product advertising expenses Ameritech incurs in connection with that network bear little, if any, causal relationship to the costs that are reflected in the marketing allocator.[90] Therefore, we will not approve Ameritech's proposal to use the marketing allocator to apportion these cost pools. Because these cost pools apparently include all the product management, sales, and product advertising expenses Ameritech incurs in connection with its packet switching network, we believe it appropriate to require Ameritech to apportion these pools in proportion to its relative packet switching investment. Ameritech shall amend its manual to specify such an apportionment. If Ameritech believes that there is a more

cost-causative apportionment method for these cost pools, it may describe that method in its revisions and attempt to show why that method would be more accurate than the method prescribed above.

Account 7220 - Operating Federal Income Taxes, Account 7230 - Operating State and Local Income Taxes, and Account 7250 - Deferred Operating Income Taxes

51. In its initial manual, Ameritech proposed to use "Relative Regulated/Nonregulated Pre-tax Book Income" to apportion current income taxes and a variety of techniques to apportion deferred income taxes between regulated and nonregulated activities. Since we believed that applying different apportionment bases to any one or group of these accounts could result in assignments of these costs that are not consistent with the related book income, we rejected Ameritech's proposals. We stated that book income, defined as operating book income before taxes and minus interest expense, would result in an appropriate distribution of net book taxes between regulated and nonregulated activities, and we directed Ameritech to amend its manual accordingly.[91]

52. In its revised manual, Ameritech proposes to use virtually the same method that it proposed in its initial manual to apportion these accounts.[92] That method does not comply with the *Ameritech Order*, and we again direct that Ameritech amend its manual strictly in accordance with our previous requirement.

III. ORDERING CLAUSES

53. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), that the revisions to Ameritech's Cost Allocation Manual ARE APPROVED, subject to the conditions stated in this Order.

54. IT IS FURTHER ORDERED that the revisions required herein shall be filed no later than December 31, 1988.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, CC Docket 86-111, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *recon.*, 2 FCC Rcd 6283 (1987) (*Reconsideration Order*), *petitions for further recon. pending.*

[2] The Ameritech Operating Companies consist of Illinois Bell Telephone Company, Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc.

[3] Ameritech Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 433 (1988) (*Ameritech Order*).

[4] *Id.* at 433-434, para. 2-3, 9; *id.* at 443, para. 94-95.

[5] Ameritech Revised Manual, Cover Letter, dated March 30, 1988, *passim.*

[6] *Id.* at 433, para. 3.

[7] With regard to those revisions that Ameritech claims it cannot make retroactively, we reserve the right to require retroactivity, or that subsequent adjustments be made to reflect the impact of the lack of retroactivity on 1988 operations.

[8] *Ameritech Order*, 3 FCC Rcd at 434, para. 9; *see also Joint Cost Order*, 2 FCC Rcd at 1317-19, paras. 147-64.

[9] *Ameritech Order*, 3 FCC Rcd at 434, para. 9.

[10] MCI Comments at 1-7.

[11] *Id.* at 2-5.

[12] *Id.* at 5-7.

[13] Ameritech Reply Comments at 3-5.

[14] *Id.* at 5-6.

[15] *Ameritech Order*, 3 FCC Rcd at 433-4, paras. 5-9.

[16] *See Reconsideration Order*, 2 FCC Rcd at 6305, para. 191.

[17] *See Joint Cost Order*, 2 FCC Rcd at 1355, n.390; *accord Reconsideration Order*, 2 FCC Rcd at 6305, para. 191.

[18] *Compare Joint Cost Order*, 2 FCC Rcd at 1355, n.390 (level of detail is comparable to that in Separations Manual, not that in the former Division of Revenues procedures).

[19] *See Joint Cost Order*, 2 FCC Rcd at 1333, para. 274.

[20] *Id.* at 1329, para. 242; *id.* at 1334, para. 283.

[21] *See id.* at 1333, para. 274.

[22] *Ameritech Order*, 3 FCC Rcd at 435, paras. 15-18.

[23] *See* Ameritech Revised Manual at V-1 to V-15.

[24] *See* 47 C.F.R. §32.27(d).

[25] Ameritech Revised Manual at V-9 and Cover Letter at 2-3.

[26] *Id.*

[27] *Id.*

[28] *Joint Cost Order*, 2 FCC Rcd at 1310, paras. 90-91.

[29] *Id.*

[30] *See* 47 C.F.R. §32.27 (d).

[31] *See* NYNEX Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, DA 88-1548, adopted Sept. 27, 1988 (*NYNEX Compliance Order*).

[32] Ameritech Revised Manual at V-10 and V-13.

[33] 47 C.F.R. §32.27.

[34] Ameritech Initial Manual at VI-16, VI-69.

[35] *Ameritech Order*, 3 FCC Rcd at 439, para. 59.

[36] PUCO Comments at 2-7.

[37] Ameritech Reply Comments at 6-13.

[38] Ameritech Initial Manual at VI-16.

[39] *Id.* at VI-69.

[40] *Ameritech Order*, 3 FCC Rcd at 439, para. 51.

[41] 47 C.F.R. §32.27 (d).

[42] *Ameritech Order*, 3 FCC Rcd at 439, para. 51.

[43] 47 C.F.R. §64.901.

[44] *Ameritech Order*, 3 FCC Rcd at 439, para. 52.

[45] Ameritech Revised Manual at V-2.

[46] *Id.* at VI-2 to VI-3. Ameritech's revised manual contains a mistake on the name of this service, resulting in needless confusion in the subsequent pleadings. It is unnecessary to discuss here in detail PUCO's comments and Ameritech's reply comments and further revisions which flowed from Ameritech's original error, except to acknowledge that the matter has now been rectified.

[47] *Id.* at VI-2 to VI-3.

[48] PUCO Comments at 3-4.

[49] Ameritech Reply Comments at 6-8 and revised pages V-2 and VI-2 to VI-3.

[50] PUCO Comments at 4-5.

[51] *Id.*

[52] Ameritech Reply Comments at 10.

[53] *Id.* at 11-12.

[54] *Id.* at 10-12, citing U S West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 195 (1988) (*U S West Order*), and quoting from it (3 FCC Rcd at 201, para. 57).

[55] *U S West Order*, 3 FCC Rcd at 201, para. 57.

[56] PUCO Comments at 6.

[57] *Id.*

[58] Ameritech Initial Manual at VI-22 to VI-24, VI-62, VI-64, VII-8 to VII- 10.

[59] *Id.* at 437, para. 32.

[60] Ameritech Revised Manual at VI-26 to VI-27, VI-70 to VI-71, VI-73 to VI-74, VII-8 to VII-10. Ameritech made the same responses about management judgment in reply to our similar directives regarding its analysis of information management (VI-8) and its study of billing and collection (VI- 17), and our discussion here applies in this respect to those subjects as well.

[61] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the Commission's Rules), *Report and Order*, 2 FCC Rcd 5770 (1987) (*Automated Reporting Requirements Order*), *petitions for recon. pending.*

[62] Ameritech Order, 3 FCC Rcd at 439, paras. 53-54. See Automated Reporting Requirements Order at Appendix C for the original list.

[63] Ameritech Initial Manual at VI-30.

[64] Id. at VI-51.

[65] PUCO Comments at 8-9.

[66] Ameritech Reply Comments at 16-18.

[67] *See* Ameritech Reply Comments at 17, n. 12: 47 C.F.R. §65.820; In the Matter of Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, Report and Order, 3 FCC Rcd 29 (1987), petitions for recon. pending.

[68] Ameritech Revised Manual at VI-34. We inadvertently overlooked this deficiency in the Ameritech Order.

[69] Ameritech Revised Manual at VI-10. We inadvertently overlooked this deficiency in the Ameritech Order.

[70] Ameritech Order, 3 FCC Rcd at 439, paras. 53-54.

[71] Ameritech Revised Manual at 51.

[72] *Id.*

[73] *Id.* at 9-10.

[74] Ameritech Reply Comments at 18.

[75] We discuss this apportionment in paragraphs 42-48, infra.

[76] 47 C.F.R. §32.7991(a). In contrast, Account 7990 is restricted to the net of total revenues and expenses from nonregulated activities that do not involve the joint or common use of assets in the provision of regulated and nonregulated products and services. 47 C.F.R. §32.7990.

[77] Ameritech Initial Manual at VI-2. There were no entries for uncollectibles in the cost allocation matrix section of the initial manual.

[78] Comments of the Office of Consumers' Counsel of Ohio, filed August 31, 1987, at 3-4. This party is not to be confused with PUCO, which is one of the two parties whose comments on the revised manual are now before us.

[79] Ameritech Reply Comments, filed September 15, 1987, at 19.

[80] Ameritech Order, 3 FCC Rcd at 441, para. 68.

[81] *Id.* Thus, under Ameritech's original methodology, (a) the regulated share of all uncollectibles would be the product of book total uncollectibles (Accounts 5301 and 5302) times the ratio of total regulated revenue to total revenue, whereas (b) under our directive, the regulated share of telecommunicationsuncollectibles only would be the product of book telecommunicationsuncollectibles (Account 5301) times the ratio of total regulated telecommunications revenue to total telecommunications revenue, and (c) under our directive, the regulated share of other uncollectibles only would be computed in the same manner as (b).

[82] Ameritech Revised Manual at VI-25 and VI-51. The latter citation consists of a first time entry in the apportionment matrix for these accounts.

[83] PUCO Comments at 7-8.

[84] Ameritech Reply Comments at 13-15.

[85] *Id.* at 14-15.

[86] Bell Atlantic Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Cost, 3 FCC Rcd 109, 120, para. 103 (1988). In the quotation of this excerpt in its Reply Comments, Ameritech underscores the word "accounts," apparently to support its assertion that the "entire accounts" are to be allocated, without any direct assignment first. Ameritech Reply Comments at 14-15. For statements of this method for two other regional holding companes, see U S West Order, 3 FCC Rcd at 206, para. 104; and Nevada Bell's and Pacific Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 287, 298, para. 101.

[87] Ameritech Order, 3 FCC Rcd at 442, para. 78.

[88] Ameritech Revised Manual at VI-68, VI-70, VI-72.

[89] *Id.* at II-2.

[90] The marketing allocator reflects all marketing costs recorded in Accounts 6611 through 6613, Account 6663 - Customer services, and Account 6722 - External relations, which are directly assigned, directly attributed, or indirectly attributed to regulated and nonregulated activities. *See* Joint Cost Order, 2 FCC Rcd at 1323-24, para. 201.

[91] Ameritech Order, 3 FCC Rcd at 443, paras. 90-91.

[92] Compare Ameritech Revised Manual at VI-2, VI-84 to VI-86 with Ameritech Initial Manual at VI-2, VI-72 to VI-74.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GENERAL TELEPHONE OPERATING COMPANIES — AAD 8-1928

Petition for Waiver of the Requirement that Revisions to the GTOC Cost Allocation Manual Shall Be Effective Retroactive to January 1, 1988

MEMORANDUM OPINION AND ORDER

Adopted: October 4, 1988; Released: October 13, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On August 12, 1988, the GTE Service Corporation and its affiliated domestic telephone operating companies (the "GTE telephone companies" or "GTOCs") filed a Petition for Waiver. The petition seeks a waiver of the requirement contained in paragraph 3 of the *GTOC CAM Order* [1] that revisions to the GTOCs' Cost Allocation Manual shall be effective retroactive to January 1, 1988. The GTOCs seek permission to continue applying the cost allocation manual as originally proposed for the balance of 1988, and to begin applying the revised manual as of January 1, 1989. For the reasons set forth below, we deny the GTOCs' request, without prejudice to the filing of a waiver request more limited in scope.

II. BACKGROUND

2. The *Joint Cost Order* [2] established principles and rules governing the accounting separation of carriers' regulated and nonregulated costs. Certain carriers, including the GTE telephone companies, were required to submit and obtain approval of manuals describing their costing methodology. Consistent with the requirements of the *Joint Cost Order* the GTOCs filed a cost allocation manual on August 28, 1987, and implemented the proposed manual on January 1, 1988, pending review and approval by the Bureau. We issued the *GTOC CAM Order* on June 6, 1988, approving the GTOCs' cost allocation manual subject to a number of conditions and requirements for the submission of further information. In addition, we stated that any revisions to the manual resulting from that order, or a subsequent order concerning the revisions, must be made effective retroactive to January 1, 1988. In accordance with this order, the GTOCs submitted their revised cost allocation manual (the "Revised CAM") on August 5, 1988. We are currently reviewing the Revised CAM.

III. THE GTOCS' PETITION

3. The GTOCs contend that it will be very difficult to accurately apply the Revised CAM during 1988. Accordingly, they request a waiver of the requirement to implement the Revised CAM retroactive to January 1, 1988, and ask that these revisions instead be effective as of January 1, 1989. The GTOCs present three major arguments in support of this request. Their first contention centers on the time involved in implementing the Revised CAM. They note that the *GTOC CAM Order* conditionally approving the cost allocation manual was released on June 6, 1988. The Revised CAM was not filed until August 5, 1988. The GTOCs observe that the Revised CAM is currently under review by the Bureau and subject to public comment. They express concern that this review may result in a final order requiring still further revisions, compounding the problems involved in retroactive implementation to January 1, 1988.

4. In their petition, the GTOCs state that they have begun the process of implementing the changes contained in the Revised CAM. They describe some of the more significant activities necessary to implement the Revised CAM retroactively, including mechanized system changes, manual procedures changes, and pre-attest audit review. The GTOCs contend that the tight time period caused by the review of the original CAM and the subsequent filing of the Revised CAM in August does not allow sufficient time to institute and adequately test the new procedures necessary to implement the Revised CAM retroactive to January 1, 1988. The GTOCs fear that rushing implementation of the changes required in the Revised CAM without proper testing and review may result in improper cost allocation between regulated and nonregulated activities.

5. Further, the GTOCs observe that they are unable to implement the necessary changes prior to the external audit which began in September. They claim that retroactive implementation of the Revised CAM, and any subsequent revisions required in a final order from the Bureau, will cause the external auditors to redo much of their work, involving additional cost. Finally, the GTOCs maintain that retroactive implementation of the Revised CAM will require revising and refiling the quarterly Automated Reporting and Management Information System (ARMIS) reports already on file with the Commission, resulting in increased administrative burden. The GTOCs contend that these implementation problems are exacerbated by the timeframe imposed by the timing of the *GTOC CAM Order* and by the filing of the Revised CAM. This timeframe, according to the GTOCs, places an undue administrative hardship on the GTOCs and threatens accurate cost separation.

6. The GTOCs' second argument supporting their waiver request focuses on the capture of data necessary to form certain new cost pools as directed in the *GTOC CAM Order*. Since these cost pools are new, the GTOCs state that procedures were not in place prior to the filing of the Revised CAM to capture the data required for these pools. According to the GTOCs, alternate methods must be developed to approximate this data. The GTOCs point out the problems in trying to assign costs by direct time reporting and survey time reporting on a retroactive basis. They contend that trying to estimate previous data in this manner may not be representative of the entire year, and may result in inaccurate cost allocation. The GTOCs as-

sert that the problems involved in gathering the required data compound the difficulty of retroactively implementing the Revised CAM.

7. The GTOCs' final argument involves the projected financial impact of the requested waiver. The GTOCs have performed a preliminary calculation of the impact of the Revised CAM on the GTOCs' financial position in 1988. [3] According to those calculations, if the Revised CAM were implemented retroactive to January 1, 1988, the annualized effect on the GTOCs' systemwide expenses subject to separations before taxes would decrease an estimated6.8 million or 0.097%.[4] The GTOCs contend that the financial impact of retroactively implementing the Revised CAM is minimal, and does not justify the imposition of the increased administrative burden.

IV. DISCUSSION

8. We deny the GTE telephone companies' petition for waiver of the requirement contained in the *GTOC CAM Order* directing them to implement the revised cost allocation manual retroactive to January 1, 1988. First, we believe that the GTOCs' petition does not meet the requirements for grant of a waiver. Waiver requests must be supported by a good cause showing of unique or extraordinary circumstances.[5] The GTOCs have not demonstrated that retroactive implementation of their Revised CAM will impose hardship unique only to the GTOCs. The Bureau's orders requring changes in carriers' cost allocation manuals have required retroactive implementation of any revisions.[6] The administrative burden caused by retroactive implementation of revised cost manuals affects most carriers involved in the ongoing cost separation process. The GTOCs are not unique in this regard.

9. The GTOCs state in their petition that accurate compliance with the Revised CAM during 1988 will be extremely difficult and will present undue administrative difficulty. However, that is not sufficient reason to grant the request that *all* changes be made prospective from January 1, 1989. We recognize that there may be administrative difficulties involved in retroactive implementation of the Revised CAM. However, our primary goal is to achieve accurate accounting separation of regulated and nonregulated costs *in 1988*. We reaffirm our view that the revisions and additional submission of information required by the *GTOC CAM Order* are very important if we are to obtain accurate cost separation data for 1988. The necessity and utility of the required revisions to insure, to the greatest extent possible, accurate cost separation in 1988 outweighs the additional administrative burden involved in implementing the changes. The GTOCs have cited examples of areas where implementation of the Revised CAM will increase their administrative burden or increase the risk of inaccurate cost separation. Aside from describing the difficulties involved in retroactive implementation, however, the GTOCs have failed to identify specific areas where they can or cannot comply with the Revised CAM in 1988. If it will be impossible, rather than just administratively difficult, to comply with the Revised CAM in specific instances, because time reports do not exist for early 1988, for example, the GTOCs should identify those areas specifically with sufficient clarity and documentation to justify relief.

10. We are mindful of the fact that certain changes may result in a small reallocation of costs. The GTOCs support their waiver request with their own calculations concerning the impact that implementation of the Revised CAM will have on the financial position of the GTOCs in 1988. The GTOCs are careful to point out that their calculations are based upon their best estimates and educated assumptions regarding certain data. These calculations, however preliminary and imprecise, tend to show that the GTOCs have a concrete picture of the revised procedures that must be put in place in order to implement the Revised CAM. This information, rather than supporting the impossibility of retroactive implementation, suggests that the GTOCs would be able to comply, at least in part, with the Revised CAM in 1988.

11. In conclusion, we reiterate our primary goal of achieving accurate cost separation in 1988. This goal would be frustrated if the GTOCs (and other major carriers) were allowed to postpone implementation of all revisions required by the *GTOC CAM Order* until January 1, 1989.

V. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), that the Petition for Waiver filed on August 12, 1988, by the General Telephone Operating Companies IS DENIED, without prejudice to the filing of a waiver request more limited in scope.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] General Telephone Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 3573 (1988) (*GTOC CAM Order*).

[2] Separation of costs of regulated telephone service from costs of nonregulated activities, *Report and Order*, CC Docket No. 86-111, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on recon.*, 2 FCC Rcd 6283 1987) (*Reconsideration Order*), *petitions for further recon. pending.*

[3] Petition at 9. The GTOCs point out that due to the difficulty in obtaining certain data on a retroactive basis, their calculations are not precise, and are based on their best estimates and educated assumptions.

[4] *Id.*

[5] National Exchange Carrier Association, 2 FCC Rcd 7049 (1987).

[6] Orders released late in 1988, however, require retroactive treatment to the extent possible.

Before the
Federal Communications Commission
Washington, D.C. 20554

BC Docket No. 81-742

In the Matter of

Formulation of Policies And Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process

ORDER GRANTING MOTION FOR EXTENSION OF TIME FOR FILING COMMENTS

Adopted: October 3, 1988; Released: October 5, 1988

By the Chief, Mass Media Bureau:

1. On August 16, 1988, the Commission released a *Second Further Notice of Inquiry and Notice of Proposed Rule Making (Notice)* [1] in the above-captioned proceeding, seeking to curtail opportunities for abuse in the renewal process and to clarify the standards used for comparing the qualifications of incumbent licensees and competing applicants in comparative renewal hearings. The deadlines for filing comments and reply comments in this proceeding are currently October 7, 1988, and November 7, 1988, respectively.

2. On September 27, 1988, a motion for extension of time for filing comments was submitted by the National Association of Broadcasters (NAB). The motion requests that the deadline for filing comments be extended by seven days to October 14, 1988, but that the November 7, 1988, deadline for reply comments not be altered.

3. NAB contends that a one week extension of time would allow for the analysis and presentation of relevant data that could be utilized by the Commission in its ultimate resolution of this proceeding. Specifically, in response to the *Notice's* request for evidence of abuses of the renewal process, NAB commissioned a survey of broadcasters regarding abuses that may have occurred in the past few years. Noting that there was a high response to this survey, NAB states that the additional time is needed for a thorough analysis of this data. NAB believes that a grant of this additional time would serve the public interest because it will provide the Commission with a fuller record upon which a knowledgeable decision may be based. Also, since it is not requesting any change in the November 7, 1988, reply comment deadline, NAB asserts that grant of its requested extension should not affect the Commission's timetable for action in this proceeding.

4. As set forth in Section 1.46 of the Commission's Rules,[2] it is our policy that extensions of time for filing comments in rule making proceedings shall not be routinely granted. This is especially true in proceedings like the instant one where we believe ample opportunity has been given for the filing of comments. Indeed, we provided the current 45 day comment period in anticipation of not granting any extensions of time. However, since the *Notice* requested the type of data that NAB has gathered and since the requested extension appears reasonably necessary to facilitate analysis of this data, we believe that good cause has been shown for granting NAB's motion. At the same time, we are of the view that it is not necessary to change the November 7, 1988, deadline for filing replies. Parties will still have three weeks to prepare such pleadings, which should be ample. As a result, we do not anticipate providing any additional time for filing replies.

5. Accordingly, IT IS ORDERED, That the motion for extension of time filed by the National Association of Broadcasters IS GRANTED and that the time for filing comments IS EXTENDED to October 14, 1988. Reply comments will continue to be due on November 7, 1988.

6. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, and 1.45 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

FOOTNOTES

[1] FCC 88-212, released August 16, 1988, 3 FCC Rcd 5179 (1988), *summarized* 53 Fed. Reg. 31894 (August 22, 1988).

[2] 47 C.F.R. Section 1.46 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 5, 1988

WESTERN UNION CORPORATION AND WORLD COMMUNICATIONS, INC. FILE APPLICATION FOR CONSENT TO THE ASSIGNMENT FROM WUC TO WORLDCOM OF CERTAIN COMMON CARRIER RIGHTS AND AUTHORIZATIONS

Western Union Corporation (WUC) and World Communications, Inc. (WorldCom) have filed an application pursuant to Section 34 of the Submarine Cable Landing Act and Section 214 of the Communications Act of 1934, 47 U.S.C. §§ 34-39, 214 (1986), and Part 63 of the Commission's Rules, 47 C.F.R. §§ 63.01 - 63.702 (1987), for consent to the assignment from WUC to Worldcom of the cable landing rights and Title II international authorizations under which Western Union World Communications Inc. (WUWC) currently operates facilities in the provision of international private line communications services (IPLS).

The application referred to has been found on initial review to comply with Commission requirements for filing. The Commission reserves the right to return the application if, on more detailed review, it is defective in any required particular, or is in non-conformance with any Commission requirement.

Any interested party wishing to file a petition to deny the referenced application shall file such petition in conformance with 47 C.F.R. § 63.52(c) on or before November 10, 1988. Applicants' Opposition to petitions and replies to Applicants' opposition are due in accordance with the deadlines contained in 47 U.S.C. § 1.45. Petitions, pleadings, and any other documents filed in this matter shall reference File No. ENF-88-18.

Copies of the subject application and any subsequently filed documents pertaining to the application may be obtained from International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20036, (202) 857-3800. The application and documents will also be available for inspection and copying in Room 6206, 2025 M Street, N.W., Washington, D.C. 20554. For further information contact Wallett Bancroft Rogers at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 6, 1988

UNC INCORPORATED AND PACIFIC TELECOM, INC., FILE JOINT APPLICATION FOR CONSENT TO THE TRANSFER OF CONTROL OF TRT TELECOMMUNICATIONS CORPORATION FROM UNC TO PACIFIC TELECOM

UNC Incorporated (UNC) and its subsidiary UNC Holdings, Inc. (Holdings) as Transferor, and Pacific Telecom, Inc. (PTI) as Transferee have filed an application pursuant to Section 1 of the Submarine Cable Landing Act of 1921, 47 U.S.C. § 34, Sections 212, 214 and 310(d) of the Communications Act of 1934, 47 U.S.C. §§ 212, 214 and 310(d), and Parts 1, 62 and 63 of the Commission's Rules, 47 C.F.R. Parts 1, 62 and 63, for consent to the transfer of control of TRT Telecommunications Corporation (TRT) and certain of its affiliated companies from UNC to PTI. The application includes consent for PTI to acquire submarine cable landing rights, common carrier authorizations, a public coast maritime mobile radio station, and an international separate systems satellite authorization.

The application referred to has been found on initial review to comply with Commission requirements for filing. The Commission reserves the right to return the application if, on more detailed review, it is defective in any required particular, or is in non-conformance with any Commission requirement.

Any interested party wishing to file a petition to deny the referenced application shall file such petition in conformance with 47 C.F.R. § 63.52(c) on or before November 10, 1988. Applicants' Opposition to petitions and replies to Applicants' opposition are due in accordance with the deadlines contained in 47 U.S.C. § 1.45. Petitions, pleadings, and any other documents filed in this matter shall reference File No. ENF-88-19.

Copies of the subject application and any subsequently filed documents pertaining to the application may be obtained from International Transcription Services, Inc., 2100 M Street, N.W., Suite 140, Washington, DC 20036, (202) 857-3800. The application and documents will also be available for inspection and copying in Room 6206, 2025 M Street, N.W., Washington, D.C. 20554. For further information contact Joy Markman at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI INTERNATIONAL, INC. File No. CSG-88-068-P/L

Application for authority to construct an international earth station at New York City, New York for the provision of INTELSAT Business Services

ORDER AND AUTHORIZATION

Adopted: September 30, 1988; Released: October 14, 1988

By the Chief, International Facilities Division:

1. The captioned application, filed on July 20, 1988 by MCI International, Inc. (MCI), requests authority, pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate international earth station facilities at New York City, New York for the provision of INTELSAT Business Services (IBS). The application was placed on public notice on July 27, 1988. No comments were received. The applicant has been granted blanket authority to establish and operate channels of communication between the U.S. and various international points for the provision of IBS service.[1]

2. The proposed earth station will consist of a 5.5 meter antenna meeting INTELSAT Standard E-2 technical parameters, and communicating with an appropriate INTELSAT V satellite in the Atlantic Ocean Region (AOR) in the 14.0 - 14.5 GHz transmitting frequency band and the 10.95 -11.2 GHz and 11.45 - 11.95 GHz receiving frequency bands. The earth station will be constructed at New York City and will be used to provide a full range of IBS services.

3. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[2] In that Order, the Commission distinguished between IBS and/or television earth stations and multipurpose stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose stations. It also determined that the public interest requires that IBS be introduced in the United States as soon as possible. The Commission therefore concluded that it would consider only minimal legal, financial, and technical qualifications of the applicant as required by Section 308 and 319 of the Communications Act of 1934, as amended, when processing IBS and television service applications. The Commission further concluded that absent special problems, it would treat these applications as routine and expeditiously process them.[3] The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[4]

4. MCI has the legal, technical, and financial qualifications to construct and operate the proposed earth station. MCI is a common carrier pursuant to the Communication Act of 1934 and provides various international services. The proposed earth station complies with INTELSAT Standard E-2 technical parameters. MCI has completed the necessary frequency coordination.

5. The scope of operation of the proposed station will be the same as that permitted by the Commission in previous IBS authorizations. We will limit the authorization to the provision of IBS and those video services compatible with the station's digital format operation. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed station. However, it may not provide any service which falls outside the IBS/television service category. Any authorization to use the proposed station as a multipurpose earth station would require a determination as to traffic and revenue diversion from existing multipurpose earth stations that may result.

6. Upon consideration of the application, we find that authorization of requested services and facilities is required by the public convenience and necessity.

7. Accordingly, IT IS ORDERED, pursuant to Sections 304, 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that application File No. CSG-88-068-P/L is GRANTED, and MCI is authorized to construct and operate the proposed earth station at New York City, New York, to provide IBS and related digital video services.[5] Before the completion of equipment installation and facility activation, however, the applicant shall provide the Commission with a summary of equipment which was actually installed.

8. This order is issued under Section 0.291 of the Commission's Rules and Regulations and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* ITT World Communications, Inc., *et al.*, File No. I-T-C-85-088, Mimeo No. 4010 (released April 18, 1985).

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of IBS and/or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] *See* the cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327, (released March 25, 1986).

[5] This authorization is not to be construed as permitting the provision of IBS between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN SATELLITE CO. File No. CSG-87-032-P/L

Application for authority to construct an international earth station at Webster, New York, for the provision of INTELSAT Business Services

ORDER AND AUTHORIZATION

Adopted: September 30, 1988; Released: October 14, 1988

By the Chief, International Facilities Division:

1. The captioned application, filed on March 20, 1987, by American Satellite Co. (Contel ASC), requests authority, pursuant to Title III of the Communications Act of 1934, as amended, and Section 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate international earth station facilities at Webster, New York, for the provision of INTELSAT Business Services (IBS). The application was placed on public notice on April 1, 1987. No comments were received. The applicant has been granted authority to establish and operate channels of communication between the U.S. and various international points for the provision of IBS service.[1]

2. The proposed earth station will consist of a 5.6 meter antenna meeting INTELSAT Standard E-2 technical parameters and communicating with INTELSAT satellites in the Atlantic Ocean Region (AOR) in the 14.0 -14.5 GHz transmitting frequency band and the 10.95 11.2 and 11.7 - 12.2 GHz receiving frequency bands. The earth station will be constructed on customer premises at Webster, New York, and will be used to provide a full range of IBS services.

3. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[2] In that Order, the Commission distinguished between IBS and/or television earth stations and multipurpose stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose stations. It also determined that the public interest requires that IBS be introduced in the United States as soon as possible. The Commission therefore concluded that it would consider only minimal legal, financial, and technical qualifications of the applicant as required by Section 308 and 319 of the Communications Act of 1934, as amended, when processing IBS and television service applications. The Commission further concluded that absent special problems, it would treat these applications as routine and expeditiously process them.[3] The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[4]

4. Contel ASC's legal, technical, and financial qualifications to construct and operate the proposed earth station are established. Contel ASC has been authorized to construct and operate other IBS earth stations.[5] The proposed earth station complies with INTELSAT Standard E-2 technical parameters. Contel ASC has completed the necessary frequency coordination.

5. The scope of operation of the proposed station will be the same as that permitted by the Commission in previous IBS authorizations. We will limit the authorization to the provision of IBS and those video services compatible with the station's digital format operation. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed station. However, it may not provide any service which falls outside the IBS/television service category. Any authorization to use the proposed station as multipurpose earth station would require a determination as to traffic and revenue diversion from existing multipurpose earth stations that may result.

6. Upon consideration of the application, we find that authorization of requested services and facilities is required by the public interest convenience and necessity.

7. Accordingly, IT IS ORDERED, pursuant to Sections 304, 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that application File No. CSG-87-032-P/L is GRANTED, and Contel ASC is authorized to construct and operate the proposed earth station at Webster, New York, to provide IBS and related digital video services.[6] Before completion of equipment installation and facility activation however, the applicant shall provide the Commission with a summary of equipment which was actually installed.

8. This order is issued under Section 0.291 of the Commission's Rules and Regulations and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* AT&T et al., File No. I-T-C-85-035 *et al.*, Mimeo No. 3220 (released March 18, 1985).

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of

IBS and/or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] *See* cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327 (released March 25, 1986).

[5] *See* American Satellite Co., File No. CSG-85-054-P/L, Mimeo No. 7394 (released October 4, 1985).

[6] This authorization is not to be construed as permitting the provision of IBS between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

OVERSEAS TELECOMMUNICATIONS, INC. File No. CSG-88-080-P/L

Application for authority to acquire, modify and operate earth station facilities at Redlands, California, for the provision of INTELSAT Business Services and International Television Service

ORDER AND AUTHORIZATION

Adopted: September 30, 1988; Released: October 14, 1988

By the Chief, International Facilities Division:

1. The captioned application, filed on July 28, 1988, by Overseas Telecommunications, Inc. (OTI), requests authority pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), 201(c)(b) and 201(c)(7) of the Communications Satellite Act of 1962, as amended, to acquire, modify and operate international earth station facilities at Redlands, California, for the provision of INTELSAT Business Services (IBS) and international television service. The application was placed on public notice on August 10, 1988. No comments were received. OTI has been granted blanket authority to establish and operate channels of communications between the U.S. and various international points for the provision of IBS and international television service.[1]

2. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[2] In that Order, the Commission distinguished between IBS and/or television services earth stations and multipurpose earth stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose earth stations. It also determined that the public interest requires that IBS be introduced in the United States as soon as possible. The Commission therefore concluded that it would consider only the minimal legal, financial, and technical qualifications of the applicant as required by Section 308 and 319 of the Communications Act of 1934, as amended, when processing IBS and television service applications. The Commission further concluded that absent special problems, it would treat these applications as routine and expeditiously process them. [3] The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[4]

3. The applicant's legal, technical, and financial qualifications to acquire, modify and operate the proposed earth station are established. The applicant has been authorized to construct and operate other IBS earth stations.[5] OTI proposes to acquire from GTE Spacenet Corporation (GTE) an antenna previously licensed for domestic communications.[6] OTI plans to replace the antenna feed and receivers to make the station comply with INTELSAT Standard B performance. The proposed earth station will consist of a 13-meter antenna conforming with INTELSAT Standard B technical parameters and communicating with Pacific Ocean Region (POR) INTELSAT satellites in the 4/6 GHz bands. OTI has completed the necessary frequency coordination.

4. The scope of operation of the proposed earth station will be the same as that permitted by the Commission in previous IBS and television authorizations. We will limit the authorization to the provision of IBS and those video services compatible with the station's digital format operation, and international television service. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed station. However, it may not provide any service which falls outside the IBS/television service category. Any authorization to use the proposed station as a multipurpose earth station would require a determination as to traffic and revenue diversion from existing multipurpose earth stations that may result.

5. Upon consideration of the application, we find that authorization of requested earth station facilities to provide IBS and television service is in the public interest.

6. Accordingly, IT IS ORDERED pursuant to Sections 304, 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that application File No. CSG-88-080-P/L IS GRANTED, and OTI is authorized to acquire from GTE, then modify and operate earth station facilities at Redlands, California, to provide IBS and related digital video services and international television service.[7] Before completion of equipment installation and facility activation, however, the applicant shall provide the Commission with a summary of equipment which was actually installed.

7. This order is issued under Section 0.291 of the Commission's Rules and Regulations and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* AT&T *et al.*, File No. I-T-C-035 *et al.*, Mimeo No. 3320 (released March 18, 1985), Overseas Telecommunications, Co., File No. I-T-C-86-163, DA 86-24 (released Oct. 8, 1986).

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of IBS and/or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] *See* cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327 (released March 25, 1986).

[5] *See* Overseas Telecommunications, Inc., File No. CSG-86-071-P/L, DA 86-128 (released Oct. 31, 1986).

[6] *See* File No. 151-DSE-P/L-84, Call Sign E6568. GTE returned its license for this facility to the Commission's Domestic Facilities Division in a letter dated August 3, 1988.

[7] This authorization is not to be construed as permitting the provision of IBS and television between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IDB COMMUNICATIONS GROUP, INC. File No. CSG-88-024-ML

Application to modify authority to construct and operate an international earth station at Culver City, California, for the provision of Television Services.

ORDER AND AUTHORIZATION

Adopted: September 30, 1988; Released: October 14, 1988

By the Chief, International Facilities Division:

1. The above-captioned application, filed on February 5, 1988 by IDB Communications Group, Inc. (IDB), requests authority to modify its earth station at Culver City, California. The application was placed on public notice on February 17, 1988. IDB filed a minor amendment on September 27, 1988. No comments were received.

2. On September 2, 1987, IDB was authorized to construct and operate an INTELSAT Standard F-2 earth station at Culver City, California, for the provision of INTELSAT Business Services (IBS) and Single-Channel-Per-Carrier (SCPC) audio services through the INTELSAT Pacific Ocean Region (POR) satellite at 180 degrees East Longitude in 6/4 GHz band.[1] In this application, IDB requests authority to: modify the subject earth station to conform with INTELSAT Standard F-1 technical parameters; provide television service; and operate with INTELSAT satellites in the arc 180-186 degrees West Longitude in the 6/4 GHz bands. IDB has completed the necessary frequency coordination.

3. Upon consideration of the instant application with its exhibits, we find that grant of authority to: modify the earth station facilities; provide television service; and operate with INTELSAT satellites in the arc from 180 - 186 degrees West Longitude is required by the public convenience and necessity.

4. Accordingly, IT IS ORDERED that application File No. CSG-88-024-ML IS GRANTED, and IDB is authorized to modify the earth station facilities at Culver City, California, to provide television service between the U.S. and those countries that now, or hereafter will be listed in Comsat's international tariff provisions for the space segment component of television. The Culver City earth station will consist of a 6.1 meter antenna which shall conform with INTELSAT Standard F-1 technical parameters operating in the 6/4 GHz bands and will provide the authorized services through POR INTELSAT satellites in the arc 180 - 186 degrees West Longitude.

5. All other terms and conditions of the Commission's Order and Authorization referenced in footnote 1 above remain the same.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] *See* O&A, IDB Authorization to Construct, 2 FCC Rcd 5531 (1987) (File No. CSG-87-036-P/L(A).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-88-186

Application for authority to acquire, install and operate a TASI-E terminal for service to the United Kingdom.

ORDER AND AUTHORIZATION

Adopted: September 30, 1988; Released: October 14, 1988

By the Chief, International Facilities Division:

1. The captioned application, filed on August 16, 1988, by American Telephone and Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire, install and operate a TASI-E terminal for use with 96 previously authorized voice-grade circuits in the TAT-6 cable for service to the United Kingdom. The application was placed on public notice on August 24, 1988. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is rquired by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-88-186 IS GRANTED, and AT&T is authorized to:

a. acquire and operate one TASI-E terminal and use it jointly with a companion terminal acquired by Mercury Communications Limited of the United Kingdom; and

b. activate and operate such TASI-E equipment with up to 96 authorized TAT-6 bearer circuits to derive up to an additional 144 circuits for the provision of AT&T's authorized services between the United States and the United Kingdom.

3. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. File No. I-T-C-88-187

Application for authority to derive additional circuitry from existing facilities for service to Bermuda

ORDER AND AUTHORIZATION

Adopted: September 30, 1988; Released: October 14, 1988

By the Chief, International Facilities Division:

1. The captioned application, filed on August 15, 1988, by American Telephone & Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to use an existing TASI-E terminal to derive additional circuits from facilities in the Canada-Bermuda (CANBER) cable and Atlantic Ocean Region (AOR) INTELSAT satellite circuits for service between the U.S. and Bermuda and beyond. The application was placed on public notice on August 24, 1988. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-88-187 IS GRANTED, and AT&T is authorized to:

a. redeploy the TASI-E system, from the Bermuda cable to the CANBER cable;

b. derive an additional 91 voice-grade circuits through TASI-E system from 71 bearer circuits in the CANBER cable;

c. derive an additional 24 voice-grade circuits form 24 AOR satellite bearer circuits through TASI-E for a maximum of six months; and

d. activate, operate and use the additional circuits for AT&T's regularly authorized services between the U.S. and Bermuda and beyond.

3. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE HAWAIIAN TELEPHONE COMPANY INCORPORATED — File No. I-T-C-88-188

Application for authority to acquire and operate facilities for service to Tonga.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 30, 1988; Released: October 14, 1988

By the Chief, International Facilities Division:

1. The captioned application, filed on August 15, 1988, by GTE Hawaiian Telephone Company Incorporated (HTC), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite facilities for direct service between Hawaii and Tonga and beyond. The application was placed on public notice on August 24, 1988. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the public convenience and necessity require the provision of direct service to Tonga by HTC.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-88-188 IS GRANTED, and HTC is authorized to:

a. lease from Comsat and operate four voice-grade satellite circuits between an appropriate earth station in Hawaii and an appropriate satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in Tonga, furnished by HTC's correspondent in Tonga; and

b. use said facilities to provide HTC's regularly authorized services between Hawaii and Tonga and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between HTC and its correspondent in Tonga, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This authorization is effective on its release date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-278

In the Matter of

Amendment of Section 73.202(b),	RM-5098
Table of Allotments,	RM-5549
FM Broadcast Stations.	
(Bolivar and Lebanon, Missouri)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: September 26, 1988; Released: October 14, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it a *Petition for Reconsideration* [1] filed by KYOO Broadcasting Company (KYOO), of the *Report and Order*, 2 FCC Rcd 6786 (1987), allotting Channel 300C2 to Lebanon, Missouri.

2. KYOO petitioned the Commission to reconsider the allotment of FM Channel 300C2 at Lebanon, Missouri, in an attempt to upgrade Channel 292A to a higher class facility. In particular, KYOO's interest involved the substitution of a Class C2 channel at Bolivar, Missouri and modification of the license of Station KYOO-FM to specify Channel 299C2. KYOO has since filed a new petition requesting the substitution of Channel 290C2 for Channel 292A at Bolivar and modification of its license for Station KYOO-FM to specify operation on the new channel (MM Docket 88-64). The *Report and Order* in that proceeding, 3 FCC Rcd 4314 (1988), has become a final *Order*, with no party having sought reconsideration. Therefore, KYOO has filed comments requesting the withdrawal and dismissal of its Petition for Reconsideration.

3. In view of the foregoing, IT IS ORDERED, That the petition of KYOO Broadcasting Company, IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Public Notice was given on December 28, 1987, Report N 1701.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request for Waivers of Part 90 of the Commission's Rules by the County of San Bernardino to Operate a County-Wide Public Safety Communication System in the 800 MHz Band	File Nos. 569744-569750

MEMORANDUM OPINION AND ORDER

Adopted: September 13, 1988 Released: September 16, 1988

By the Commission: Commissioner Quello issuing a separate statement; Commissioner Dennis concurring and issuing a statement.

I. INTRODUCTION

1. The Commission has before it applications for review of an *Order* by the Chief, Private Radio Bureau,[1] granting conditional waivers of certain provisions of Part 90 of the Commission's Rules, 47 C.F.R. §§ 90.1 - 90.657. The American SMR Network Association, Inc. (ASNA), the National Association of Business and Educational Radio, Inc. (NABER), the Special Industrial Radio Service Association, Inc. (SIRSA), Lyons Community Property Trust (Lyons), and Sigma Telecommunications (Sigma)[2] ask that the Commission reverse the decision of the Private Radio Bureau (Bureau) and set aside or modify the *Order*. The County of San Bernardino (County) filed Reply Comments [3] in opposition, and the applicants for review filed replies to the County's opposition pleading.[4]

2. Upon review of the record, we conclude that the applicants for review have failed to provide a basis for reversing the Bureau's *Order*. In granting the conditional waivers, the Bureau fully considered the issues presented as grounds for review. Accordingly, we deny the applications for review. An intervening factor, however, persuades us to clarify the waiver by adding further conditions. On December 18, 1987, we released our *Report and Order* establishing a national plan for the use of radio communications by public safety entities.[5] The purpose of the *National Public Safety Plan* is to ensure that the recent allocation of 6 MHz in the 821-824/866-869 MHz band to the Public Safety Radio Services will be used efficiently for important public safety functions such as crime control, fire fighting, and emergency medical services.[6] These are precisely the functions to be performed by the public safety agencies that will use the County's proposed communications system. Because of the comprehensive nature of the *National Public Safety Plan*, we conclude that a slight modification of the Bureau's *Order* to require the County to implement its system, to the extent possible, using offsets in the public safety pool is warranted.

II. BACKGROUND

3. In April 1987, the County requested waivers of certain of the Commission's Rules to enable it to (1) use frequencies 12.5 kHz offset from regularly assignable public safety channels in non-border areas (Section 90.362, 47 C.F.R. § 90.362); (2) trunk among frequencies designated only for conventional use (Section 90.615, 47 C.F.R. § 90.615); and (3) use frequencies 12.5 kHz offset from channels in categories other than the public safety pool (Section 90.617, 47 C.F.R. § 90.617). The Bureau issued a public notice soliciting comments on the County's proposal.[7] None of the thirteen entities that filed timely comments strongly objected to the County's proposal, although some conditioned their support.[8]

4. On October 19, 1987, the Chief, Private Radio Bureau, pursuant to delegated authority, adopted an *Order* granting the waiver requests subject to specified conditions.[9] The *Order* granted the waivers on the condition that the County comply with the pertinent coordination requirements of the Commission's Rules, as set forth at 47 C.F.R. § 90.175. The Bureau noted that the use of new technology would promote the Commission's policy goal of spectrum efficiency[10] and recognized that the County had committed itself to afford interference protection to existing licensees.[11] In addition, the *Order* required the County to "take immediate steps" to resolve any interference to users licensed as of the date of the *Order*.[12] The Bureau concluded that grant of the waivers was in the public interest and would not undermine the purpose of the rules that were waived.[13]

5. The primary concern of those opposed to the County's proposal is interference. The applicants for review assert that the *Order* modified existing licenses without notice or opportunity for a hearing, in violation of Sections 309 and 316 of the Communications Act, 47 U.S.C. §§ 309, 316, because these licensees will be forced to accept interference from the San Bernardino system.[14] These objectors assert that the condition of the waiver that the County correct interference problems is insufficient. They contend that their allegations of potential interference require the Commission to schedule the matter for hearing.

6. The applicants also assert that the County's technical analysis is deficient because the County used better than average equipment for its tests rather than sampling current "in the field" equipment.[15] They argue that the actual equipment used by most systems will be subject to much greater interference potential. Furthermore, the applicants contend that the County did not provide the technical parameters of the proposed sites and that the coverage maps it used are inaccurate.[16]

7. Sigma and SIRSA contend that the County did not adequately justify its needs. Moreover, they argue that alternatives exist whereby the County may use channels offset only from public safety channels or use the 6 MHz of spectrum allocated in the *National Public Safety Plan*.[17] Therefore, they contend, the County failed to satisfy the standard for grant of a waiver set forth in Section 90.151 of our Rules, 47 C.F.R. § 90.151.

8. Finally, NABER alleges that the Bureau's *Order* violates the Administrative Procedure Act (APA) by reallocating, *de facto*, spectrum to the public safety pool. NABER challenges the Bureau's statement that it will apply the existing co-channel separation criteria to applications for frequencies in the SMR category or the original trunked category that are 12.5 kHz offset from the

County's system.[18] NABER contends that the Bureau cannot afford the County full protection as defined in our current rules without conducting a notice and comment rule making proceeding.[19]

9. In opposition, the County defends its technical analysis and maintains that the proposed system will meet its public safety communications requirements without adversely affecting existing licensees.[20] Specifically, the County argues that the tests were designed to establish the viability of the concept of channel offsetting and did so.[21] Furthermore, the County contends that the tests were technically sound because, for example, the mobile radio equipment had been in operation from three to five years,[22] and the effect of frequency drift was evaluated.[23] Moreover, the County selected channels to avoid harmful impact,[24] the coverage maps were taken from actual SMR applications,[25] and technical parameters were provided in the applications.[26]

10. In their Replies, those opposed to the County's system reiterate their criticism of the County's tests and the likelihood of interference.[27] Sigma also alleges in its Reply that the waivers are inconsistent with the purpose of the *National Public Safety Plan*.[28]

III. DISCUSSION

A. Modification of Licenses

11. The applicants for review and the petition for hearing by Fleet Call, Inc. assert that the request for waivers should have been designated for hearing pursuant to Sections 309 and 316 of the Communications Act, 47 U.S.C. §§ 309 and 316, because the *Order* modified existing licenses by permitting interference on preauthorized frequencies and by failing to protect future users from interference. Existing licenses were not, however, modified within the meaning of Section 316 because the conditional nature of the waivers precludes rather than permits interference.[29] If the County's system causes interference to existing licensees, the County will have to cure the interference.[30] If the County's interference difficulties prove insurmountable, the County must terminate operation. The licenses held by the preexisting operators were not, therefore, modified as a result of granting these waivers.

12. In addition, to protect existing licenses further, we shall require that the County conduct tests with all potentially affected base station licensees and representative end users before placing a station in full operation.[31] In this way, the County will be able to identify problems and correct them before it begins full operation. Although we believe that compatibility between the County's system and those of existing licensees can be achieved by use of mileage separation, careful choice of frequencies, the use of offset technology, and technical configuration (e.g., directional antennas), we will disapprove operation at any proposed site if the results of the preliminary tests required herein indicate a harmful level of interference.[32]

13. The applicants for review also contend that the Bureau invalidly modified existing licenses by failing to extend protection to future end users, assignees and transferees.[33] The concern arises from the statement in the *Order* that, "[T]he County must take immediate steps to resolve any interference to *users licensed as of the date this waiver is issued*. "[34] We are persuaded to modify that provision to include all present and future end users of existing base stations. Hence, add-on users to existing SMRs and community repeaters will be protected by the condition. Furthermore, we will extend interference protection to subsequent assignees and transferees of the existing systems. Base stations that were not licensed as of the date of the *Order* and their users, however, will not be entitled to protection, because their locations cannot be anticipated. As a practical matter, while it is possible for the County to engineer in against existing facilities, it cannot engineer in against future unknown stations.

B. Technical Considerations

14. Central to the applicants' concern about interference is the assertion that technical deficiencies in the County tests undermine the non-interference determination. The County disagrees with the allegations that the tests did not represent a sampling of current "in the field" equipment that they were conducted with better than average equipment, and that the tests were not conducted using portable transceivers.[35] While the County's technical submissions are not dispositive of the interference issue, they indicate a sufficient likelihood of successful offset operation to support this waiver and our giving the County an opportunity to conduct further tests. If the tests are successful, the County may begin operations on a non-interference basis. The use of offsets has been highly successful in border areas and in other bands, e.g., 150 MHz and 450 MHz bands. The success of offset channels in other bands gives us confidence that they can be used successfully at 800 MHz. In addition, the proposed system's configuration, wherein many of the sites will be in remote areas near the Arizona and Nevada borders, reduces the prospect of interference to other licensees. Of twenty-six proposed sites only three are short-spaced and the County has proposed protective technical constraints, such as directional antennas, at these sites. The size and complexity of the system, however, militate in favor of a cautious approach. Further testing also conforms to suggestions by ASNA and other joint commenters.[36]

15. Therefore, we conclude that a two-step licensing procedure is warranted for all sites using frequencies offset from those designated for non-public safety services. After the County reviews its frequency needs, we will grant a developmental license for each site that is offset from a non- public safety frequency. We will issue a permanent license only after a review of the results of the interference tests. Ultimately, the burden remains on the County to correct interference at its own expense. The County must correct interference to base stations and mobiles or it must cease operation.

C. Consistency with National Public Safety Plan

16. ASNA takes exception to arguments that the County's request is consistent with the Final Report prepared by the National Public Safety Planning Advisory Committee (NPSPAC).[37] ASNA points out that the NPSPAC Final Report did not address the issue of public safety entities using offsets adjacent to non-public safety licensees.[38] Furthermore, ASNA argues the Report assumed that there would be cooperation among licensees on offset channels and that all the licensees would use enhanced equipment.[39] Sigma suggests, as did SIRSA and ASNA, that the County should use offsets to other public safety licensees rather than to non-public safety entities.[40] To this end, we note that the County has proposed to use several offsets to other public safety licensees, and we will require it to do

so to the maximum extent possible. Use of frequencies offset to non-public safety frequencies must be justified on a frequency-by-frequency, site-by-site basis.

17. Moreover, as noted above, to maintain consistency with the *National Public Safety Plan* the County should use frequencies in the 821- 24/866-69 MHz bands for public safety. The County should readily be able to modify its equipment to operate in the 6 MHz of public safety spectrum because the spectrum allocated by the *National Public Safety Plan* is adjacent to the frequency bands to be used by the County. Accordingly, we expect the County to participate actively in the formation of the regional plan by seeking spectrum in the 821-824/866-864 MHz band as an eventual substitute for continued use of frequencies offset from non-public safety spectrum.

D. Waiver Standards

18. With regard to the contention that the County failed to meet existing waiver standards, our rules require a waiver request to contain a *prima facie* showing of unique circumstances and lack of a reasonable alternative.[41] After reviewing the record, we conclude, as did the Bureau, that the County met these waiver standards. The County asserted a lack of regularly assignable frequencies due to frequency congestion in the Los Angeles metropolitan area[42] and argued that the proposed use of offset frequencies is the only alternative available to meet its immediate public safety communication needs.[43] The severity of the problem of frequency congestion in the Los Angeles metropolitan area is documented.[44] Furthermore, we observed in the *National Public Safety Plan* that the additional 6 MHz of public safety spectrum may not be sufficient to satisfy all demands by eligible public safety entities in congested areas.[45] Therefore, the planning committees were given five years to submit regional plans.[46] In view of the immediate nature of the County's needs, and in light of the projected time for full implementation of the *National Public Safety Plan*, use of the newly allocated public safety spectrum is not a viable option for the County at this time. The County, therefore, satisfied the Commission's waiver standards.

E. Administrative Procedure Act

19. Finally, NABER contends that the Bureau's actions constitute a rule making in violation of the APA. NABER's attack is two-pronged. First, NABER contends that to waive the rules and permit the County to use non-public safety offset frequencies in San Bernardino for its public safety service requires a notice and comment rule making under the APA. In addition, NABER argues that before the Bureau can apply the current 70/105 mile separation criteria[47] to applications for the offset frequencies in the non-public safety bands,[48] as stated in the Order,[49] a notice and comment rule making would be required. With respect to NABER's first argument, the APA's rule making requirements are inapplicable to this proceeding because a decision to waive the rules in the context of considering a particular application constitutes an adjudication, rather than the promulgation of a general rule requiring notice and comment rule making procedures. *See generally, WAIT Radio v. FCC*, 418 F. 2d 1153, 1157 (D.C. Cir. 1969) ["The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances."]. Similarly, we affirm the Bureau's decision to apply the existing mileage separation rules to any future operations that are adjacent to stations in the county's system. In adjudicating any license application, the Commission may, on an *ad hoc* basis, grant a license and accord the licensee whatever operating rights, including protection from objectionable interference, the Commission determines are in the public interest. Moreover, applying the current mileage separation to protect this applicant's operations is consistent with our existing rules. The Commission's rules currently specify a fixed mileage separation to determine the assignment of co-channel SMR systems.[50] Because use of the offsets will have an electromagnetic effect on co-channel facilities that is similar to the electromagnetic effect of use of the existing channels, the Bureau reasonably concluded that it should treat the offset frequencies in the same way as the co-channel assignments for purposes of interference protection from future stations.[51]

IV. CONCLUSION

20. For the foregoing reasons, the Commission affirms, with some additional conditions, the *Order* by the Private Radio Bureau. The requested waivers are a reasonable response to an immediate and pressing public need in the area of public safety that cannot be accommodated within the existing rules. The County must, however, make all reasonable attempts to satisfy its needs by use of channels offset from public safety frequencies before using other frequencies. Further, in light of the *National Public Safety Plan*, we will require the County to meet, to the extent possible, its long-term communications needs within the 6 MHz allocated for public safety in the 800 MHz band by eventually transferring operations on channels offset from non- public safety frequencies to channels or offsets in the public safety pool or made available by the regional plan.

21. Accordingly, pursuant to Sections 1.3, 1.103, and 90.151 of the Commission's Rules, and in view of the discussion above, IT IS ORDERED THAT the Applications for Review are DENIED.

22. IT IS FURTHER ORDERED that the request for hearing by Fleet Call, Inc. is DENIED.

23. IT IS FURTHER ORDERED that the decision of the Bureau as expressed in its *Order* of December 19, 1987, IS AFFIRMED with the following modifications:

(a) The County shall review its plan and make a showing justifying all use of offsets to non-public safety spectrum;

(b) The Bureau will issue developmental licenses and the County shall conduct tests with all potentially affected base station licensees and representative end users before placing any station in full operation.[52] In accordance with the procedure for a developmental license,[53] a report of the results of the tests for each site shall be submitted to the Chief, Private Radio Bureau, and shall include a statement of concurrence from each short- spaced base station licensee.

24. IT IS FURTHER ORDERED that licensing of the County's system shall proceed on a two-step basis. We will issue a developmental license[54] for each site that will use frequencies offset from non-public safety spectrum after the County completes a review of its frequency needs as

described in paragraph 23(a), above. A permanent license will be issued only after a review of the interference tests ordered above.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] Request for Waivers of Part 90 of the Commission's Rules by the County of San Bernardino to Operate a County-Wide Public Safety Communication System in the 800 MHz Band, 2 FCC Rcd 6721 (1987) (*Order*).

[2] In addition to the formal pleadings, the Commission has received over 350 letters from SMR licensees and end users expressing concern about possible interference to their operations.

[3] The County's Reply Comments were untimely filed on December 16, 1987. *See* 47 C.F.R. § 1.115(d). Subsequently, a letter requesting that the Commission accept the late-filed pleading was submitted on December 22, 1987. The Commission will accept the late-filed pleading in the interest of fully developing the issues on review.

[4] ASNA, NABER, and Lyons filed a consolidated reply on January 6, 1988; Sigma and SIRSA filed separate replies on January 11, 1988, and January 15, 1988, respectively. On April 5, 1988, Fleet Call, Inc., the parent corporation of Comven, Inc., filed a Request for Hearing and Comments on Petitions for Reconsideration that essentially restate the arguments made by the applicants for review. The substance of Fleet Call's request for hearing is addressed *infra* at paras. 11-13. Additionally, Fleet Call asserts that grant of the waivers will restrict technical flexibility by precluding digital data services. Request for Hearing by Fleet Call, 11-12. We reject this contention as speculative. In approving the concept of technical flexibility, we did not limit our ability to provide for immediate actual needs for use of the spectrum. The County's immediate public safety communications needs outweigh the mere possibility of a future type of service whose merits we will consider when an application therefor is submitted.

[5] Report and Order, In the Matter of Development and Implementation of a Public Safety National Plan and Amendment of Part 90 to Establish Service Rules and Technical Standards for Use of the 821-824/866-869 MHz bands by the Public Safety Services, General Docket No. 87-112, 3 FCC Rcd 905 (1988) (*National Public Safety Plan*). *Erratum* released January 6, 1988 (DA 87-1869).

[6] *Id.* at para. 1.

[7] *Order* at para. 3. *See also* Public Notice, DA 87-1231, 52 Fed. Reg. 34295 (September 10, 1987).

[8] The following entities filed timely comments: APCO, ASNA, Association of American Railroads, California Public Safety Radio Association, City of Los Angeles, City of San Diego, County of Orange, Culver City Fire Department, Los Angeles County Sheriff's Department, Los Angeles Police Department, NABER, Southern California Public Safety Regional Communications Planning Committee, and the State of California. The Commission also received four sets of late- filed comments. Lyons, Comven, Inc., and California Trunking asked the Commission to delay a final decision pending further evaluation. Sigma alleged that the County's system would cause substantial interference to existing licensees and asked the Commission to deny the waivers. *Order* at para. 3 and n. 4. On October 19, 1987, Advanced Mob Radiotelephone Services, Inc. and V&L Enterprises filed jo comments asking the Commission to grant the waivers, if a only on a developmental basis.

[9] The Bureau granted conditional waivers of the following rul (1) 47 C.F.R. § 90.362 (Selection and assignment of frequencie (2) 47 C.F.R. § 90.615 (Frequencies available for conventio systems in the 806-908.750/851- 854.750 MHz bands); and (3) C.F.R. § 90.617 (Frequencies in the 809.750- 816/854.750-8 MHz bands available for trunked or conventional system use non-border areas).

[10] *Order* at para. 5.

[11] To eliminate interference, the County plans to use enhanc equipment with additional transmitter splatter filters, antenn orientation, local terrain conditions, and the additional isolatio provided by offsetting. License Applications and Request fo Waiver by County of San Bernardino (Application) part I (Method for Improving Radio Frequency Spectrum Efficiency Both the UHF and 800 MHz Bands); *see Order* at n. 9 an accompanying text.

[12] *Order* at para. 6.

[13] *Order* at para. 5 (citing WAIT Radio v. FCC, 418 F.2d 11 (D.C. Cir. 1969); Thomas Radio v. FCC, 716 F.2d 921 (D.C. Ci 1983)).

[14] *See , e. g.*, Application for Review by ASNA, 17-20; Applic tion for Review by Lyons, 8; Petition for Review by NABER, 3- Application for Review by Sigma, 5-14; Application for Revie by SIRSA, 4-8.

[15] Application for Review by ASNA, 6-9; Application for Re view by Lyons, 4-6; Application for Review by Sigma, 10-14; an Application for Review by SIRSA, 7-8.

[16] Application for Review by ASNA, 11; Application for Revie by Lyons, 5; Application for Review by Sigma, 10; and Applic tion for Review by SIRSA, 7-8.

[17] Application for Review by Sigma, 14-15; Application fo Review by SIRSA, 8-9. *See* para. 15 *infra*.

[18] *Order* at para. 7.

[19] Petition for Review by NABER, 4-5.

[20] Reply Comments by County, 4-5.

[21] *Id.* at 6-8.

[22] *Id.* at 7.

[23] *Id.* at 8.

[24] *Id.* at 5.

[25] *Id.* at 9.

[26] *Id.*

[27] *See , e. g.*, Consolidated Reply of ASNA, Lyons, and NABER, 2-5; Reply of Sigma, 7-8; and Reply of SIRSA, 7-8.

[28] Reply of Sigma, 2-6.

[29] *See* Western Broadcasting v. FCC, 674 F.2d 44, 55 (D.C. Cir. 1982) (construing term "modify); *accord* P&R Temmer v. FCC, 743 F.2d 918, 927 (D.C. Cir. 1984).

[30] *Order* at para. 6.

[31] *See* para. 23 *infra*.

[32] *See* 47 C.F.R. § 90.7 (definition of 'harmful interference').

[33] Lyons and ASNA phrase this argument in terms of "marketability" of existing licenses. Application for Review by Lyons, 7; Application for Review by ASNA, 16.

[34] *Order* at para. 6 (emphasis added).

[35] Reply Comments by County, 7.

[36] Consolidated Reply of ASNA, Lyons, and NABER, 5-7.

[37] NPSPAC is an advisory group composed of industry representatives whose purpose is to make recommendations to the Commission regarding implementation of a national public safety plan. *See supra*, n. 5 and accompanying text.

[38] Application for Review by ASNA, 10.

[39] *Id.*

[40] Application for Review by Sigma, 14-15; Application for Review by SIRSA, 8-9; Application for Review by ASNA, 14.

[41] 47 C.F.R. § 90.151.

[42] The County stated that it proposed the use of offset channels after conducting extensive research on behalf of over eighty County public safety and public service agencies in an attempt to identify available spectrum. License Applications and Request for Waiver by County of San Bernardino (Application), 2.

[43] San Bernardino states that it is the largest county in the contiguous United States and is experiencing rapid growth in population. *Id.*

[44] *See , e. g.*, Report and Order, In the Matter of Amendment of Parts 2, 73, and 90 of the Commission's Rules and Regulations to Allocate Additional Channels in the Band 470-512 MHz for Public Safety and Other Land Mobile Services, General Docket 84-902, 51 Fed. Reg. 4352 (1986). None of the parties to this proceeding dispute the severity of the frequency congestion problem in the Los Angeles metropolitan area.

[45] *National Public Safety Plan* at para. 13.

[46] *Id.*

[47] 47 C.F.R. § 90.621(b)

[48] 47 C.F.R. § 90.617

[49] *Order* at para. 7 and n. 15.

[50] The Commission itself assigns frequencies in the SMR and original trunked categories whereas three private frequency coordinating committees perform that function in other categories of frequencies above 800 MHz. *See* Report and Order, PR Docket 83-737, 103 FCC 2d 1093 (1986). *See also* Report and Order, Amendment of Part 90 Subparts M and S, 3 FCC Rcd 1838 (1988) (200 general access trunked channels transferred to SMR pool), *reconsideration pending*, 53 Fed. Reg. 20170 (June 2, 1988).

[51] *See* Order at n. 13.

[52] To this end, we encourage the County to work with the Commission's Office of Engineering and Technology to develop a testing plan to determine the extent of interference at each proposed site.

[53] 47 C.F.R. § 90.517 (Report of operation).

[54] Grant of a developmental license does not confer any long-term right to operate at any site. See 47 C.F.R. § 90.515 (Change or cancellation of authority without hearing).

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO

Re: Request for Waivers of Part 90 of the Commission's Rules by the County of San Bernardino to Operate a County-Wide Public Safety Communication System in the 800 MHz Band.

I support this item and want to underscore the County of San Bernardino's ("County") responsibility to assure that interference problems are resolved. In resolving interference, the County must bear all financial and other obligations. If interference problems can not be resolved technically, then the County will have to cease operation on those frequencies causing interference. Also, I recognize that with mobile communications the ability to detect and to determine the source of interference is often very difficult. Therefore, the responsibilty to assure against interference will require significant effort, and I encourage the County to engineer its systems in the most interference free manner.

The County has the responsibility to protect existing and add-on business mobile radios operating on the appropriate business channels. Public safety coordinators must assure that coordination is neither delayed nor denied on the basis of the County's use or possible use of non-public safety spectrum.

CONCURRING STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

I agree that the County of San Bernardino has demonstrated good cause for a waiver of the Commission's rules so it can use non-public safety frequencies for public safety. I do not believe, however, that the record justifies a permanent waiver at this juncture. The Commission recently allocated an additional 6 MHz of spectrum in the 821-824/866-869 MHz band for public safety use, spectrum which the County is eligible to use. This new spectrum will become available once the Commission approves the regional public safety plan proposing tentative uses for this band.

The County is expected to "participate actively in the formation of a regional plan by seeking spectrum in the 821-824/866-869 MHz band as an eventual substitute for continued use of frequencies offset from non-public safety spectrum". Order at para. 17. If the new frequencies have the potential to meet the County's needs, a permanent waiver permitting the County to use non-public safety spectrum for public safely appears unnecessary. For this reason, a temporary waiver until the regional public safety plan is developed and approved by the Commission would have been a better course.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-288

In re Applications of

NIRVANA RADIO BROADCASTING CORPORATION — File No. BPH-860203MH

VALLEY RADIO CORPORATION — File No. BPH-860203PC

For Construction Permit for a new FM station on Channel 264 in Christiansburg, Virginia

Appearances

James L. Oyster on behalf of Nirvana Radio Broadcasting Corporation and *Barry A. Friedman* and *Michael Drayer* on behalf of Valley Radio Corporation.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: October 6, 1988; Released: October 14, 1988

1. The two applications remaining in the caption and six other applications, now dismissed, were designated for hearing on July 24, 1987 to consider on a comparative basis which mutually exclusive proposal should be granted. *Hearing Designation Order*, 2 F.C.C. Rcd 4654 (1987). The following issues will be decided in this decision:

1. To determine, with respect to Valley whether, in light of the evidence adduced concerning New River Broadcasting Corporation's status as a debtor-in-possession of Station WFNR, Blacksburg, Virginia, the applicant is financially qualified.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

2. Examination of the written testimony was conducted on December 21, 1987. Proposed findings of fact and conclusions of law were filed by Nirvana and Valley on February 22, 1988. Replies were filed by both applicants on March 14, 1988.

FINDINGS OF FACT

Issue 1: Whether Valley is financially qualified.

3. Robert T. S. Colby, 100% owner of Valley, has established an account and certificate of deposit for the exclusive use of Valley at Burke & Herbert Bank and Trust Company, Alexandria, Va. Valley Exh. 5, at 1, attach., at 1. The account contains135,000. *Id.* He also deposited with the same bank marketable Municipal Bond Trusts worth55,782.42. Valley Exh. 5, at 1, attach, at 2. These unencumbered liquid assets provide Valley with190,782.42. Valley estimates that construction and operation of the station will require 70,021. Valley Exh. 5, at 2, attach., at 6-8.

4. Mr. Colby represents that New River Broadcasting Corporation has no claim on Valley's assets. Valley Exh. 5, at 2. Mr. Colby stated that New River Broadcasting Corporation's principal obligation at the time of its bankruptcy reorganization has been settled. *Id.* The court order, settlement agreement and other bankruptcy documents support his view. Valley Exh. 5, attach, at 9-28.

5. When Valley filed its application, it relied on Mr. Colby's assets. Valley Exh. 6, at 1. Mr. Colby reviewed them and determined that his liquid net worth at the time was sufficient to provide the money needed by Valley. *Id.* In making that determination, he considered his liquid assets and short term and long term liabilities. *Id.* He obtained oral quotations from Bob Denham and Victor C. Bosiger about the cost of construction. *Id.* Mr. Denham is the engineer at WFNR(AM), Blacksburg, Virginia, which is owned by Mr. Colby, and Mr. Bosiger is a principal of Media Sales, Inc. and is experienced in constructing new FM facilities. *Id.* Mr. Denham estimated construction costs of25,000 and Mr. Bosiger estimated construction costs of30,000. Valley Exh. 6, at 4. Mr. Colby, who operates and owns WFNR(AM) prepared estimates of operation expenses himself. *Id.* Mr. Colby, on this basis, concluded that his net liquid assets exceeded the amount he needed. *Id.* Mr. Colby believed he had available net liquid assets of208,669.68 and, in addition, a promise of a100,000 loan from his friend Martin Schnider. *Id.*, attach., at 1-3.

Issue 2: Comparative Proposals

Nirvana

6. Nirvana does not propose to seek any credit for integration. Nirvana Exh. 1. Nirvana and its principals have no media interests. Nirvana Exh. 1. Nirvana proposes emergency power generators at both the studio and transmitter sites. *Id.* The parties have stipulated that there are no decisionally significant coverage differences. Jt. Exh. 1.

Valley

7. Robert T. S. Colby is the sole principal of the applicant; he owns, through New River Broadcasting Corporation, station WFNR(AM) at Blacksburg, Virginia. Valley Exh. 2. Mr. Colby has made a timely promise to divest his interest in WFNR. *Id.* Barry A. Friedman, counsel to Valley, was, for a short time, its assistant secretary, but, on March 25, 1987, he resigned. *Id.* Mr. Friedman had no position on the board or any ownership interest. *Id.*

8. Mr. Colby has promised to work full time, 40 hours per week, as the station's general manager. Valley Exh. 3. He will supervise all personnel and be responsible for all

day-to-day operations of the station. *Id.* Mr. Colby has owned WFNR at Blacksburg. Valley Exh. 4. He has, through daily telephone contact, held overall control of the station. *Id.* He makes all decisions of consequence at the station. *Id.* If Valley's application is granted, Mr. Colby, who is a judge, will retire and move to and make Christiansburg, Virginia his home. *Id.* Valley proposes to install auxiliary power equipment. Valley Exh. 7.

CONCLUSIONS

Valley's Financial Condition

9. The Mass Media Bureau, at the time of designation of Valley's application for hearing, concluded that because Valley's sole principal, Robert T. S. Colby, was also the sole owner of New River Broadcasting Corporation, the licensee and debtor-in-possession of station WFNR, Blacksburg, Virginia, a question was raised about the validity of Valley's certification of its financial qualifications. *HDO*, 2 F.C.C. Rcd 4654 (1987). Since this proceeding began, New River Broadcasting has resolved its financial problems and the bankruptcy proceeding has ended. A settlement has been reached with New River's principal creditor. To insure that Valley will have available money that will be free of the debts of New River or its principal, Mr. Colby has transferred money to the Burke & Herbert Bank and Trust that is only for Valley's needs. Valley has available liquid assets of 190,782 and a need for construction and operation of only 70,000. Those funds were secured for Valley after Mr. Colby certified the applicant's financial qualifications.

10. Before the application was filed, Mr. Colby reviewed his financial status. He determined that his net liquid assets, excluding liabilities, were adequate to finance Valley's proposal. To determine how much he needed for construction and operation of the proposed facility, he obtained two oral estimates about construction costs and he estimated the operation costs himself. He concluded that he had available208,669 of his own money and, if an oral promise of a 100,000 loan from a friend, Martin Schnider, were included, he had available a total of308,669. The cost estimates of construction and operation were approximately70,000. Mr. Colby relied on his own financial records, but he did not, at that time, prepare written summaries to submit to the Commission. The same method was applied to his estimate of the money he would need to finance the Valley proposal.

11. While Mr. Colby did not prepare a balance sheet contemporaneously with certifying Valley's financial qualifications, he did review his financial documents that made up the balance sheet he ultimately prepared. That analysis and the one which he made of construction and operation costs appear reasonable and reliable. *Northampton Media Associates*, FCC 88R-51, released August 26, 1988, at para. 18.[1] This method of determining Valley's financial qualifications does not exhibit bad faith. Mr. Colby, when he did prepare a written analysis, was able to support his earlier conclusions. Moreover, he has now taken steps to satisfy the concerns of the Bureau about any burden the financially troubled New River Broadcasting might present to establishing a new FM station by Valley in Christiansburg. Mr. Colby has agreed to pay that corporations' debts and he has established accounts for Valley that will not be affected by the problems of New River Broadcasting, should they continue. Valley has demonstrated that it acted in good faith in certifying its financial qualifications and it has established that it is financially qualified.

COMPARATIVE FACTORS

12. Neither Nirvana nor Valley, or the applicants' principals, have mass media interests. Valley's counsel, Barry A. Friedman, briefly acted as assistant secretary of the corporation and he has minor media holdings. But Mr. Friedman never held an ownership interest and there is no evidence that he exercised any control over the applicant.

13. Nirvana does not seek integration credit and Valley proposes the full-time integration into management of its only stockholder, Robert T. S. Colby. Mr. Colby will retire from his present job and move to Christiansburg to manage the station if a grant is made to Valley. Both Nirvana and Valley propose auxiliary power and neither applicant asserts any advantage in their proposed coverage. Therefore, Valley is comparatively superior to Nirvana because of its proposal to integrate Mr. Colby. Valley is entitled to the construction permit on the basis of that promise.

OTHER FILINGS

Amendments

14. On May 27, 1987, Valley petitioned for leave to amend to report that an application had been made assign to WFNR(AM) to WFNR, Inc. On June 14, 1988, Nirvana petitioned for leave to amend to report that Kenneth R. Strawberry had become a limited partner in Dominion Broadcasting Company and Dominion had filed a "mutually exclusive application with the renewal of station WFNR." On July 14, 1988, Valley petitioned for leave to amend to report that the assignment of WFNR would not occur immediately because of the competing application of Dominion. Good cause exists for granting these petitions and accepting the amendments.

February 22, 1988 Motion to Reopen the Record

15. On February 22, 1988, Valley petitioned for leave to reopen the record to submit information about the suitability of a former antenna site of Nirvana. The information submitted by Valley does not relate to any issue in the proceeding. The motion will be denied.

ACCORDINGLY, IT IS ORDERED that the motion to reopen the record, filed September 8, 1988 by Valley Radio Corporation IS DENIED.

IT IS FURTHER ORDERED that the petitions for leave to amend filed May 27, 1988 and July 14, 1988 by Valley Radio Corporation ARE GRANTED and the amendments ARE ACCEPTED.

IT IS FURTHER ORDERED that the petition for leave to amend, filed June 14, 1988 by Nirvana Radio Broadcasting Corporation IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the motion to reopen the record, filed February 22, 1988 by Valley Radio Corporation IS DENIED.

IT IS FURTHER ORDERED that the third motion for production of documents, filed December 4, 1987 by Nirvana Radio Broadcasting Corporation IS DISMISSED AS MOOT.

IT IS FURTHER ORDERED that the application of Nirvana Radio Broadcasting Corporation (File No. BPH-860203MH) IS DENIED and the application of Valley Radio Corporation (File No. BPH-860203PC) for a construction permit for a new FM station on Channel 264 in Christiansburg, Virginia IS GRANTED provided that, before permission for test authority is granted, its sole stockholder, Robert T. S. Colby divests his interest in WFNR(AM), Blacksburg, Virginia and permittee submits documentation of compliance with the following special operating condition along with the Form 302, application for license, and the request for program test authority. The permittee shall, upon completion of construction and during the equipment test period, make proper RF field strength measurements throughout the WFNR(AM) tower area to determine if there are any areas that exceed the ANSI, EPA, and FCC specified guidelines for human exposure to radiofrequency radiation. If necessary, a fence must be erected at such distances and in such manner as to prevent the exposure of humans to radiofrequency radiation in excess of the American National Standards Institute Guidelines (OST Bulletin No. 65, October, 1985). The fence must be of a type which will preclude casual or inadvertent access, and must include warning signs at appropriate intervals which describe the nature of the hazard. Any areas within the fence found to exceed the recommended guidelines must be clearly marked with appropriate visual warning signs.[2]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTES

[1] Valley has moved to reopen the record to consider the Board's opinion in *Northampton Media Associates*. It is unnecessary to reopen the record to consider recent Board decisions; therefore, the request will be denied.

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-372

In the Matter of

Amendment of Parts 2 and 80 of the
Commission's Rules Applicable
to Automated Maritime
Telecommunications Systems (AMTS)

ORDER

Adopted: October 5, 1988; Released: October 6, 1988

1. Under consideration is a request for extension of time filed by Waterway Communications System, Inc. (Watercom) on October 3, 1988, in the above captioned matter. The *Notice of Proposed Rule Making* in this matter provided that comments could be filed on or before September 26, 1988, and reply comments, on or before October 11, 1988. Watercom requests an additional 20 days, until October 31, 1988, to file reply comments.

2. Watercom states that the additional time is needed to prepare a complete analysis of the comments, which include highly technical matters, so that it can contribute to a more complete and accurate record in this rule making. Additionally, Watercom is the party which petitioned for the rule changes proposed in this proceeding, and no other party is likely to be prejudiced by the requested extension.

3. In view of the above and pursuant to the authority contained in Section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331, Watercom's request for extension of time is granted. Reply comments are due October 31, 1988.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL EXCHANGE CARRIER ASSOCIATION, INC.

Petition for Waiver of Sections 36.191(a) and 36.421(a) of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: September 28, 1988; Released: October 14, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On December 22, 1987, the National Exchange Carrier Association (NECA) filed a Petition for Waiver of Sections 36.191(a) and 36.421(a) of the Commission's rules[1] for its traffic sensitive (TS) pool members.[2] These rules define "equal access" equipment and expenses for separating those costs between the interstate and intrastate jurisdictions. NECA seeks to include costs that do not meet the equal access definition. NECA also seeks a waiver to allow the TS pool members to recover non-capital equal access expenditures in the year in which they are incurred, rather than capitalize and amortize these costs over the period ending December 31, 1993, as presently required. For the reasons stated below, we deny NECA's request for waiver of the equal access definition, and grant the request to expense equal access costs.

II. NECA'S PETITION AND PARTIES' COMMENTS

2. Sections 36.191(a) and 36.421(a) of the Commission's rules provide two conditions under which a local exchange carrier's (LEC's) costs qualify for the separations procedures applicable to equal access costs [3]: (1) when expenditures are used to convert central offices that service competitive interexchange carriers (ICs); or (2) when there is a bona fide request for conversion to equal access. If costs qualify for this equal access definition, the carrier allocates those costs on the basis of equal access minutes, thereby resulting in a significant allocation to the interstate jurisdiction.[4]

3. NECA requests that we waive those conditions so that the costs of its TS pool members will qualify for classification as equal access costs for separations purposes when TS pool members install equal access capabilities at the time the carrier converts an office to stored program control, rather than only in the circumstances defined in Sections 36.191(a) and 36.421(a). NECA states that by the end of 1987, the overwhelming majority of telephone access lines will have been converted to equal access, with a large portion of the non-converted lines located in rural areas served by smaller LECs. NECA contends that grant of its waiver would: (1) encourage these LECs to install equal access capability in an efficient manner; and (2) make the benefits of full interexchange competition more widely available in rural areas. In particular, NECA states that the present rules create a disincentive for installation of equal access capability in conjunction with an upgrade to digital switching equipment unless the LEC serves competitive ICs or has received a request for implementation of equal access. NECA argues that there are sound reasons for installing equal access capability in conjunction with a switch upgrade, citing a number of instances in which such an installation was substantially less expensive than retrofitting the offices to provide equal access at a later date. NECA also observes that in these cases the incremental cost of installing equal access capability is a very small portion of the total expenditures.

4. NECA also requests that its TS pool members be permitted to recover non-capital equal access expenses in the year in which those expenses are incurred. Equal access costs are currently required to be amortized over the period ending December 31, 1993.[5] NECA states that the Bureau recently granted similar waiver requests of several companies to expense rather than capitalize these expenditures.[6] NECA contends that we should waive the amortization requirement for the same reasons we granted those waiver requests, *i.e.*, because of the insignificance of the equal access expense involved and the burden imposed by additional accounting costs required to implement amortization of the expense.[7] In the *Waiver Orders*, the carriers that received waivers of the amortization requirement estimated that equal access expenses were usually less than 0.5 percent of their interstate revenue requirement. NECA contends that the equal access conversion expenses the TS pool members would incur would not be significantly higher than those experienced by the carriers included in the *Waiver Orders*.

5. Ten parties filed comments in this proceeding.[8] All commenters except AT&T support NECA's request for a waiver of Sections 36.191(a) and 36.421(a). Supporters of the waiver request essentially reiterate NECA's arguments. AT&T contends that NECA's waiver request does not show the "unique or extraordinary circumstances" that affect NECA's TS pool members as it claims is required for the grant of a waiver of the Commission's rules. AT&T opposes the waiver request, because, it argues, NECA has raised issues which the Joint Board and the Commission have considered and rejected three times.[9] AT&T also asserts that NECA provides no justification for overturning the carefully considered determination of the Joint Board and the Commission that there is no need to expand the definition of equal access costs. AT&T contends that the LECs already have sufficient economic incentives to implement conversion to equal access coincident with the installation of a new switch because, as indicated by NECA's petition, the costs of implementing equal access at the time of switch installation are less than the costs of a subsequent retrofit. Moreover, AT&T maintains, the LECs are not hampered in their ability to recover the costs of conversion through state and interstate rates because the costs not accorded equal access treatment are included in other separations categories.[10] AT&T further argues that if the Commission grants this waiver request it will effectively redefine equal access costs. AT&T contends that this revised definition will cause an overallocation of switching costs to the interstate jurisdic-

tion because the equal access minutes allocation factor reflects only the ICs' use of equal access facilities. AT&T does not oppose NECA's request that the TS pool members be allowed to expense, rather than capitalize and amortize, the equal access expenditures.

6. In reply, NECA maintains that it has demonstrated unique circumstances that warrant the grant of its waiver request. First, NECA asserts that its request is limited only to its TS pool members. These companies, it asserts, represent the smallest LECs serving rural areas where subscribers, for the most part, do not have a "1+" dialing choice. NECA also states that because ICs other than AT&T have a presence in rural exchanges by way of non-premium Feature Groups A & B, Extended Area Service (EAS) and/or interim 800 service, the IC has less incentive to make a bona fide request for equal access and pay premium rates in rural offices. NECA further asserts that rural subscribers thus lose the benefits of full equal access and competition.

7. Finally, NECA cites, in support of its request, Commission decisions which provide regulatory relief for small companies.[11] According to NECA, the *Small Companies Order* recognized the need to reduce administrative and regulatory burdens on small companies and the *NTS Recovery Order* retargeted the Commission's Universal Service funding to provide more support to study areas under 200,000 access lines. NECA argues that the goals set forth in these orders would be furthered by a grant of its waiver.

III. DISCUSSION

A. *Equal Access Recovery*

8. We deny NECA's request for waiver of Sections 36.191(a) and 36.421(a) of the Commission's rules. NECA's petition does not meet the requirements for grant of a waiver, especially when, as here, waiver for 1300 carriers would effectively undermine the validity of the rule.[12] Moreover, NECA fails to provide a good cause showing of unique or extraordinary circumstances.[13] Rather, as shown below, NECA relies on two arguments which the Commission directly or indirectly rejected in adopting the rule. Also, we note that the *Small Companies Order*, which NECA cites as support for its waiver request, was aimed at relieving the financial burdens on small companies that file their own access tariffs. That case is not adequate support for the subject waiver. In that case the Commission found that small telephone companies may face administrative costs that are proportionately higher in relation to their revenue and smaller resources than large companies. NECA has not shown that its pool members would face such administrative financial burdens or other comparable burdens by having to comply with the applicable separations rules. There is no reason to believe that the equal access allocation procedures are less burdensome than allocation procedures that these carriers are presently required to use. Rather, NECA merely speculates that classifying costs as equal access would encourage LECs to install equal access facilities efficiently and encourage ICs to extend the advantages of full interexchange competition to rural areas.

9. Before addressing NECA's arguments for a waiver, we set forth the considerations which led to adoption of the rules in question. The Commission's rules define equal access costs as the initial incremental expenditures for hardware and software that are related directly to the provision of equal access and which, absent the provision of equal access, would not be required to upgrade the switching capabilities of the office for conversion of offices which serve competitive ICs or for conversion in response to a bona fide request for conversion.[14] The Joint Board specifically recommended that the equal access category be limited to the costs of converting offices which serve competitive interexchange carriers or costs incurred in response to a bona fide request for conversion to equal access.[15] The Joint Board distinguished such costs from those associated with reconfiguring the network, which were to continue to be separated under the existing procedures.[16] The Commission adopted the Joint Board's recommendation, and codified the narrow definition of equal access set forth in Part 36 of the rules. The Commission's policy, therefore, has been to limit these costs to those study areas that meet our definition of equal access. This policy was developed out of concern that previously existing separations procedures might result in excessive allocation of equal access costs to the state jurisdictions.[17] In addition, both the Commission and the Joint Board were concerned that "absent competition or a bona fide request for equal access there would appear to be no legitimate reason to implement equal access, and any such costs should be excluded from the equal access category."[18]

10. In support of its request, NECA first asserts that we should grant its request because that action will "encourage interexchange carriers (ICs) to extend the advantages of full interexchange competition to rural America . . . ."[19] However, the Commission specifically considered and rejected in the *Reconsideration Order* the argument that the equal access definition should be expanded to attract competing ICs to rural carriers' exchanges.[20] Given the Commission's clear rejection of that argument, NECA may not rely on it in support of the waiver herein.

11. NECA's second argument is that a waiver would encourage smaller exchange carriers to install equal access capability in the most efficient manner. It asserts that the TS pool members could realize substantial savings if they initially install equal access capability at the time a central office is converted to digital equipment, rather than retrofitting the office with equal access equipment at a later date. Thus, NECA concludes that "coincident installation would appear to be a sound, cost effective approach to equal access conversion."[21] This argument does not support the waiver, however. As the Commission pointed out, the limited definition of equal access for separations purposes does not deny the carriers the ability to recover their investment.[22] If it is economically prudent to incur additional costs at the time that a central office is converted, the carrier may do so and recover those costs through their inclusion in the other separations categories. The purpose of the definition of equal access for separations purposes is to achieve an equitable division of costs between the interstate and intrastate jurisdiction.[23] However, that definition should not be the controlling factor in a carrier's decision whether to install plant.

B. *Capitalization of Expenses*

12. We will grant NECA's request for waiver of the amortization of equal access costs requirement for the TS pool members, so that they may recover such non-capital costs in the period that they are incurred. NECA stated in its petition that although it had no specific examples on

which to base cost estimates, those expenses for its TS pool members would not be higher than those experienced by the carriers covered by the *Waiver Orders*.[24] At the staff's request, NECA submitted estimates as to the level of such costs.[25] NECA estimates that the maximum annual expense for TS pool members attributable to conversions to equal access would be less than1,581,000, or approximately 0.42% of their revenue requirement.[26] We conclude that NECA has shown that the level of expenses at issue is sufficiently small that expensing those costs would have no adverse rate impact, and that there are benefits flowing to ratepayers from waiver of the amortization requirement. *See generally United Order*, *supra*, 2 FCC Rcd at 5104-05.

IV. ORDERING CLAUSE

13. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), That the Petition for Waiver filed on December 22, 1987, by the National Exchange Carrier Association IS GRANTED, to the extent set forth in para. 12, and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] NECA sought a waiver of Sections 67.193(a) and 67.421(a) of the Commission's Rules. Those sections were superseded on January 1, 1988, by Sections 36.191(a) and 36.421(a), respectively. Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72, 80-286 and 86-297, 2 FCC Rcd 2639 (1987).

[2] There are approximately 1300 carriers in the TS pool. Although many of those carriers are small carriers operating in rural areas, the TS pool also includes large telephone companies.

[3] Although LECs may voluntarily convert to equal access, even if no Other Common Carrier (OCC) has requested interconnection services, the costs incurred in such conversions do not meet the definition of equal access costs in our rules. "Even where no OCC has requested interconnection services, the replacement of electromechanical equipment with an [stored program-controlled (SPC)] digital switch can be economically advantageous where significant savings in maintenance and other operating expenses are achieved." MTS and WATS Market Structure, Phase III, 100 FCC 2d 860 at 880 n. 58 (1985).

[4] *See* 47 C.F.R. §36.191(c).

[5] *Equal Access Accounting Reconsideration Order*, 1 FCC Rcd at 437.

[6] The Centel Companies, Petition for Waiver of the Commission's Rules and Regulations Regarding the Eight-year Amortization Period for Equal Access Expenses, 2 FCC Rcd 1487 (1987); United Telephone System Companies, Petition for Waiver of the Commission's Rules and Regulations Regarding the Eight-year Amortization Period for Equal Access Expenses, 2 FCC Rcd 5104 (1987) (*United Order);* GTE Service Corporation, *et al.*, Petition for Waiver of the Commission's Rules and Regulations Regarding the Eight-year Amortization Period for Equal Access Expenses, 2 FCC Rcd 6933 (1987) (collectively, the *Waiver Orders).*

[7] *See, e.g., United Order*, 2 FCC Rcd at 5104-5.

[8] The following parties filed comments: Telephone Utilities Exchange Carrier Association; National Telephone Cooperative Association; United States Telephone Association; ICORE, Inc.; Standish Telephone Company; Cathey Hutton & Associates, Inc.; Century Telephone Enterprises; Public Service Telephone Company; Contel Corporation; and The American Telephone and Telegraph Company (AT&T). NECA filed reply comments.

[9] *See* MTS and WATS Market Structure and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, Mimeo No. 138, released October 8, 1985 (*Recommended Decision and Order);* MTS and WATS Market Structure and Amendment of Part 67 of the Commission's Rules, CC Docket Nos. 78-72 and 80-286, FCC 86-6, released January 7, 1986 (*Decision and Order); recon. denied*, 1 FCC Rcd 615 (1986) (*Reconsideration Order).*

[10] *See Reconsideration Order*, 1 FCC Rcd at 616.

[11] Regulation of Small Telephone Companies, 2 FCC Rcd 3811 (1987) (*Small Companies Order)* ; MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, 2 FCC Rcd 2953 (1987) (*NTS Recovery Order).*

[12] *See* WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969) quoting Rio Grande Family Radio Fellowship, Inc. v. FCC, 406 F.2d 664 (D.C. Cir. 1968)(very essence of waiver is the assumed validity of the general rule . . .).

[13] National Exchange Carrier Association, 2 FCC Rcd 7049 (1987).

[14] *See* 47 C.F.R. Part 36, Appendix

[15] *See generally* Recommended Decision and Order.

[16] *Id.* at para. 29.

[17] *Id.* at para. 31.

[18] *Id.*

[19] Petition at 2.

[20] *Reconsideration Order,* 1 FCC Rcd at 615, para. 4; 617, para. 16.

[21] Petition at 5.

[22] *Reconsideration Order,* 1 FCC Rcd at 616, para 12.

[23] *Id.*

[24] Petition at 6.

[25] Letter from James W. Frame to H. Walker Feaster, dated September 22, 1988.

[26] It is not clear whether this figure is based on the assumption that the definition of equal access costs will be waived. In view of our action herein, the actual noncapital costs may be lower than the estimate.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE BELL ATLANTIC TELEPHONE COMPANIES

Offer of Comparably Efficient Interconnection to Providers Of Gateway Services

MEMORANDUM OPINION AND ORDER

Adopted: September 23, 1988 Released: September 30, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On March 30, 1988, pursuant to the requirements of the *Computer III* proceeding,[1] the Bell Atlantic Telephone Companies (Bell Atlantic) filed a Comparably Efficient Interconnection (CEI) Plan (the Plan) for the provision of enhanced gateway, electronic mail, and computer storage services on an integrated basis with its regulated telephone operations. Six parties filed comments on the plan, and two parties filed reply comments.[2] Bell Atlantic twice filed supplemental information regarding the Plan. [3] Pursuant to our delegated authority, we approve the Plan for gateway service.[4] However, we do not approve Bell Atlantic's CEI proposals for electronic mail and computer storage services which in the current plan are extremely vague and incomplete. Bell Atlantic is free, of course, to refile CEI plans for those services when it is able to provide the information needed for an approvable CEI plan.[5]

II. BACKGROUND

2. The *Computer III* orders permit Bell Atlantic to offer a specific enhanced service, or class of services, on an unseparated basis only after our approval of a CEI plan. Under the Commission's CEI requirements, carriers must provide interconnection opportunities to others on the basis of an "equal access" standard to insure that basic facilities are available to other enhanced service providers and users on an unbundled and functionally equal basis.[6] A CEI plan must also satisfy other nonstructural safeguards governing the use of customer proprietary network information (CPNI), disclosure of network information, and nondiscrimination reporting.[7]

III. THE PROPOSED SERVICE

A. *Gateway Service*

3. Bell Atlantic states that its gateway service will allow a customer with a personal computer and a communications capability to reach an array of enhanced services.[8] Bell Atlantic states that customers will access gateway service through either the switched network or via analog or digital private lines. Customers that dial the gateway service telephone number will be routed by the serving central office switch to a packet assembler-disassembler (PAD) that is dedicated to the gateway service. The PAD will perform asynchronous/X.25 protocol conversion and add certain signaling for transmission to a centrally located gateway processor.[9] Bell Atlantic states that the gateway processor will initially be owned by and located on the premises of a third party contractor. The contractor will provide the communications link between its premises and Bell Atlantic's network facilities leased by gateway service. After the initial trial phase of the service, the processor may be located on Bell Atlantic property but will be entirely owned by and dedicated to the enhanced gateway service.[10]

4. The processor will provide gateway service customers with a menu that lists enhanced service providers available through the gateway. Alternatively, the customer can access a "key word" index of specific services. From the menu, the customer may view a description of the provider's service and pricing structure. From the key word index, the customer can receive a second menu of providers of the selected service.[11] When a customer selects an enhanced service provider, the call is routed back to the PAD, which "dials" the enhanced service provider through Bell Atlantic's Public Data Network (PDN). If the enhanced service provider is located in another LATA, PDN delivers the call to an interexchange service provider or private facility designated by the enhanced service provider which carries the call to its destination.[12]

1. *Regulatory Status of Bell Atlantic's Gateway Service*

a. *Positions of the Parties*

5. ALC claims that Bell Atlantic's gateway service is a basic service, subject to Title II regulation.[13] It characterizes gateway service as a basic switching service for routing data calls from end users to enhanced service providers, analogous to the switched access services that a typical central office performs for voice communications end users. The fact that a "dumb" computer terminal is involved, ALC claims, does not change this basic service into an enhanced service. ALC concludes that Bell Atlantic must unbundle this basic, switched gateway service from its enhanced service offerings, and that Bell Atlantic must file interstate tariffs for its gateway service.[14]

6. Bell Atlantic responds that its gateway service is enhanced because of several interrelated features. First, the gateway allows customers to conduct "key word" searches to identify the enhanced service providers the customer desires to use, a capability that Bell Atlantic states is enhanced because it involves "subscriber interaction with stored information". Second, the gateway allows customers to obtain the description and prices of enhanced service provider services, a function Bell Atlantic states is enhanced because it provides the customer with "additional, different, or restructured information" than the information that the calling or called parties transmit. Third, Bell Atlantic states that the net protocol conversion provided within the gateway is an enhanced service under the Commission's rules.[15]

b. *Discussion*

7. The Commission defines "enhanced services" as:

> [s]ervices offered over common carrier transmission facilities, which employ computer processing applications that act on the format, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.[16]

We find that Bell Atlantic's proposed gateway service is enhanced based on this definition. As Bell Atlantic states in its reply comments, the "key word" search capability of the gateway and its provision of descriptions and prices of available enhanced services involve subscriber interaction with stored information and content restructuring under the definition. In addition, the gateway employs protocol processing that the Commission defines as enhanced.[17] Thus, Bell Atlantic's gateway will offer services within all three clauses of the enhanced service definition. Accordingly, we reject ALC's argument that we should classify gateway service as "basic".

2. ***Adequacy of Gateway Service Description***

a. ***Positions of the Parties***

8. Two commenters object that the Plan contains a vague description of gateway service that may give rise to a host of discriminatory and anticompetitive practices. ANPA states that the Commission should require more detail about the operation of the enhanced service provider listing and key word index, regarding how information is presented, in what order enhanced service provider listings will be shown, and how key words will be determined and assigned, to assure that Bell Atlantic cannot discriminate in favor of any enhanced service provider.[18]

9. MPC states that computer owners who access gateway service will see one or more menus leading them to a specific enhanced service provider, and that the following competitive issues arise: a) Will Bell Atlantic's menu "steer" users to Bell Atlantic services by systematic first ranking, bold face type, or otherwise?; b) Will the menu be used for messages promoting Bell Atlantic enhanced services? Should any messages not essential to the menu function be permitted?; and c) What "right" does an enhanced service provider have to be included on the gateway service menu?[19]

10. Bell Atlantic responds that the Plan fully meets the Commission's requirement to provide "a short general description of the enhanced service offered to notify [the Commission] of the utility and purpose of the CEI arrangements described in the plan." Bell Atlantic also states that the discussion that ANPA requests relates only to its provision of an enhanced (and unregulated) gateway and has no relevance to the provision of its underlying basic services to other enhanced service providers.[20] It states that, in any event, it will not discriminate in the provision of gateway service.[21]

b. ***Discussion***

11. As Bell Atlantic argues, because gateway service is an enhanced service, it is not regulated by the Commission. Although Bell Atlantic's provision of the underlying basic services are, of course, the subject of regulation (including CEI requirements), ANPA and MPC appear to be asking us to regulate how Bell Atlantic offers an enhanced service. This is beyond the scope of the Commission's CEI requirements.[22] Bell Atlantic's service description adequately permits us to evaluate the utility of the underlying CEI arrangements, and we do not require any additional modifications to it.[23]

B. ***Electronic Mail and Computer Storage Services***

12. Bell Atlantic proposes to provide two additional services in conjunction with gateway service. The first is an electronic mail service that Bell Atlantic plans to market as a selection on the gateway menu that will provide storage and transmission of customer-originated printed messages, including documents. The service will forward messages to the intended recipients in the same form and content as they are created by the originator. Bell Atlantic intends initially to resell the electronic mail service of a third party vendor, and states that if it offers its own electronic mail service prior to approval of its ONA plan, then it will first submit for our approval a separate request for that offering.[24]

13. Second, Bell Atlantic seeks to provide a computer storage service whereby it will offer computer capacity for enhanced service providers to store information. Customers may obtain access to this information through gateway service. Bell Atlantic will have no control over the content of the information. Instead, the customer will obtain such information just as the enhanced service provider entered it into the Bell Atlantic computer.[25]

1. ***Adequacy of Service Descriptions***

a. ***Positions of the Parties***

14. MPC states that Bell Atlantic has attempted to join three CEI plans in one (gateway service, computer storage, and electronic mail). It notes that Bell Atlantic summarily describes its proposed computer storage and electronic mail services in one paragraph each, and argues that each constitutes a separate enhanced service for which a separate CEI plan must be filed.[26]

15. ANPA states that Bell Atlantic's computer storage proposal is particularly vague and includes no description of how either enhanced service providers or customers will store information or retrieve it. It also states that Bell Atlantic's proposal to resell another party's electronic mail service raises questions about the nature and scope of that service, including whether the service includes any elements that would be prohibited by the MFJ. ANPA suggests that the Commission should require a detailed description of the proposed electronic mail service to make an informed decision as to its lawfulness.[27]

b. ***Discussion***

16. There is no reason to require separate CEI plans for enhanced services that are provided as a package if a carrier demonstrates that the CEI arrangements for those services comply with the Commission's CEI requirements. However, the information Bell Atlantic has supplied regarding CEI for its proposed computer storage and electronic mail services does not indicate the basic CEI services that Bell Atlantic would supply to an enhanced service provider that desired to provide those services. Apparently, Bell Atlantic has not decided on the contractor it will use to provide computer storage and electronic mail service, and is therefore undecided on how the services will be offered.[28] It appears, therefore, that Bell Atlantic's filing of a CEI plan for these two services was

premature. Because the purpose of CEI review is to ensure that such basic services will be supplied in a nondiscriminatory manner, we do not approve Bell Atlantic's proposals to offer computer storage and electronic mail service at this time. Bell Atlantic may, of course, file CEI plans for computer storage and electronic mail service after it has settled on the specifics of these offerings and can demonstrate compliance with the Commission's CEI requirements.

IV. GATEWAY SERVICE COMPLIANCE ISSUES

A. *CEI Requirements*

17. The Commission's CEI requirements are designed to give enhanced service providers equal and efficient access to those basic services that AT&T and the BOCs use to provide their own enhanced services.[29] The Commission did not require absolute technical equality, but rather sought to provide fairness and efficiency for all competing enhanced service providers. In formulating the CEI parameters, the Commission took care to see that they could be satisfied in a flexible manner, consonant with the particular services at issue. We evaluate the CEI parameters formulated by the Commission[30] pursuant to this standard, and discuss specific parameters below.

1. *Proposed CEI Arrangements*

18. Bell Atlantic states that a competing gateway service provider may obtain standard dial-up business lines under existing local tariffs, which will allow end users to dial into its gateway.[31] Locally tariffed services include business exchange service, 800 service, One Number Service, PDN service and Message Desk service.[32] A competitor that wishes to allow its customers to access its processor through the use of Bell Atlantic's PDN packet switching service, with or without protocol conversion, may obtain PDN service at the same rates as Bell Atlantic's gateway. The competitor may also choose to install its own PAD to communicate with its processor and to perform functions similar to those performed by Bell Atlantic gateway's PAD.[33]

19. Bell Atlantic will obtain all underlying basic services at their full tariffed rates, with no "short loop" or collocation discount.[34] Bell Atlantic states that its gateway service will obtain all basic services under existing tariffs that are equally available to competing gateway providers. According to Bell Atlantic, it will provide neither gateway service nor its competitors with any special interfaces, signaling, or other unique capabilities.[35]

2. *CEI Parameters*

20. The *Phase I Order* lists nine CEI parameters that are designed to ensure that the basic services used by a carrier's enhanced service are available to other enhanced service providers in an equally efficient manner.[36] Commenters raise issues with respect to six of these parameters which we discuss below.[37]

a. *Interface Functionality*

21. As part of its CEI offering, the carrier must provide standardized hardware and software interfaces that support transmission, switching, and signaling functions identical to those used in its own enhanced service offering, with information and technical specifications for such interfaces subject to the Commission's network disclosure requirements.[38]

(i) *Positions of the Parties*

22. ANPA argues that Bell Atlantic does not describe how it will assure nondiscriminatory access by enhanced service providers to its PADs used in gateway service, nor does it describe how a competing gateway would interconnect its own PADs to the central office. ANPA also claims that Bell Atlantic does not make it clear how it will provide "nondiscriminatory access to its gateway, storage, and electronic mail services," *i.e.*, ANPA apparently assumes that Bell Atlantic has an obligation to offer nondiscriminatory access to enhanced service providers that desire to be included on the gateway. ANPA urges us to require Bell Atlantic to show how it will comply with the requirement to make available standardized hardware and software interfaces to support the transmission, switching, and signalling functions of the PAD.[39]

23. Bell Atlantic states that the PAD described in the Plan is used exclusively for the provision of gateway service. Accordingly, Bell Atlantic considers the PAD to be part of its "enhanced" gateway service rather than an underlying basic service, and does not intend to make the PAD available to third parties. Bell Atlantic also states that the PAD it will use is competitively available, *i.e.*, a third-party gateway service provider could purchase and deploy an identical device.[40]

(ii) *Discussion*

24. Bell Atlantic states that competitors may connect to the basic services underlying gateway service through standard existing interfaces.[41] Because gateway service is enhanced, the PADs that Bell Atlantic proposes to use exclusively for gateway service are unregulated equipment.[42] Thus, Bell Atlantic has a nondiscrimination obligation for the basic services that, for example, connect its gateway PADs to the network, but not for the PADs themselves. Moreover, Bell Atlantic has clarified that similar PADs are competitively available and that competitors will be able to connect their PADs to Bell Atlantic's central offices through standard technical interfaces. Accordingly, the Plan satisfies this parameter.

b. *Unbundling*

25. The basic service functions that underlie an enhanced service offering of a BOC must be unbundled from other basic services and associated with a specific rate element in the CEI tariff.[43]

(i) *Positions of the Parties*

26. Bell Atlantic states that the basic services that underlie gateway service are either currently offered under tariff or will be so offered prior to introduction of the service.[44] It states that all are available to competing gateway service vendors under the same rates, terms, and conditions available to its gateway service.

27. ANPA states that Bell Atlantic should indicate its plans regarding the unbundling of PAD access, storage, electronic mail, and other gateway services.[45] ALC, arguing that gateway service is a basic service, states that Bell Atlantic must unbundle the basic portion of gateway service from the enhanced service portion.[46]

(ii) *Discussion*

28. ANPA errs in attempting to apply CEI parameters to Bell Atlantic's enhanced service offerings, rather than to the underlying basic services to which CEI rules apply. Bell Atlantic has adequately addressed the issue of unbundling for purposes of our CEI review by making available to competing gateway service vendors all basic services underlying the provision of gateway service under the same rates, terms, and conditions available to its gateway operations. ALC's argument turns on whether gateway service is enhanced or basic. Because we conclude that gateway service is enhanced, as discussed above, we reject ALC's unbundling claim.

c. *Technical Characteristics*

29. As part of its CEI offering to enhanced service competitors, Bell Atlantic must offer basic services with technical characteristics that are equal to those of the basic services it uses for its own enhanced services. These characteristics include, but are not limited to: transmission parameters, such as bandwitdth and bit rates; quality, such as bit error rate and delay distortions; and reliability, such as mean time between failures.[47]

(i) *Positions of the Parties*

30. Bell Atlantic states that interconnection to its gateway service will be through standard network interfaces. These line-side interfaces will support identical transmission, switching, and signaling functions for gateway services offered by Bell Atlantic and its competitors. Bell Atlantic states that the facilities provided to gateway service and its competitors will fully comply with the Commission's parameters for technical equality, *i.e.*, there will be no user-perceived qualitative differences in measured quality. Bell Atlantic states that its procedures for processing and assigning circuits are highly mechanized and assures that there can be no systematic discrimination in circuit assignment based on the customer or proposed use. Bell Atlantic also agrees to file an annual affidavit attesting that its procedures have been followed and that no discrimination has in fact occurred.[48] ANPA, without elaboration, contends that Bell Atlantic fails to describe the software interfaces applicable to interconnection with the PAD.[49]

(ii) *Discussion*

31. As noted above, Bell Atlantic will employ a dedicated, unregulated PAD to provide enhanced gateway service. Thus, Bell Atlantic has no CEI obligations with respect to technical characteristics of its PAD. Competitors can provide their own PADs for interconnection to Bell Atlantic basic service offerings through standard interfaces.

d. *End User Access*

32. A carrier must offer to all end users any features that it offers to end users of its own enhanced service operations.[50]

(i) *Positions of the the Parties*

33. Bell Atlantic states that customers using its gateway service or a competitor's gateway service will dial the same number of digits to access the gateway. No abbreviated dialing of derived channels will be needed or offered to access gateway service.[51] ANPA notes that Bell Atlantic's service will provide "mnemonic dialing"[52] to access enhanced service providers via the gateway and calls for Bell Atlantic to describe how this mnemonic dialing will be offered to end-users. Bell Atlantic clarifies in its Supplement that mnemonic dialing is a feature of its enhanced PAD.[53]

34. ANPA also asks how Bell Atlantic will assure nondiscrimination in the assignment of telephone numbers for end-user calling of its own and competing gateways.[54] Bell Atlantic replies that any gateway provider may request a specific telephone number that will be assigned if available.[55]

(ii) *Discussion*

35. Because we find gateway service and the PAD to be enhanced, Bell Atlantic has no obligation to provide the mnemonic dialing function to competitors. Third party gateway service providers can acquire the capability to provide mnemonic dialing by using PADs similar to those used by Bell Atlantic. Bell Atlantic's response that it will assign competitive gateway providers the telephone numbers they request if such numbers are available is a reasonable solution to ANPA's concern regarding Bell Atlantic's number assignment practices.

e. *Installation, Maintenance, and Repair*

36. The time periods for installation, maintenance, and repair of basic services and facilities included in a CEI offering must be the same as those the carrier provides to its own enhanced service operations.[56]

(i) *Positions of the Parties*

37. Bell Atlantic incorporates into the Plan its amended ONA installation and maintenance procedures.[57] ANPA incorporates by reference its criticisms in the ONA proceeding of Bell Atlantic's installation and maintenance procedures.[58] Bell Atlantic responds that its proposed reports contain all the information required. It contends that ANPA failed to seek reconsideration of this issue, so that its attempt to raise it here amounts to an improper collateral attack.[59]

(ii) *Discussion*

38. Bell Atlantic's proposed installation and maintenance procedures are those that we recently approved with respect to Bell Atlantic's message storage service.[60] As we decided in that order, objections raised regarding Bell Atlantic's procedures are properly addressed in the ONA proceeding, following an evaluation of the extensive record that has been compiled in that proceeding.[61] Accordingly, we approve Bell Atlantic's installation and maintenance procedures, pending any changes adopted by the Commission in its ONA decision.

f. *Minimization of Transport Costs*

39. The *Phase I Order* required BOCs to provide competitors with interconnection facilities that minimize transport costs.[62] The *Phase II Reconsideration Order* clarified that a carrier may satisfy this CEI requirement if it charges itself the same amount for interconnection as it charges its competitors.[63]

(i) *Positions of the Parties*

40. Bell Atlantic states that the Commission has held that this condition is satisfied where, as here, affiliated and unaffiliated enhanced service vendors are charged the same rate for all underlying basic services.[64] MCI states that Bell Atlantic has not complied with this requirement.

It contends that Bell Atlantic assumes that enhanced service providers may be located outside the Pennsylvania LATA in which Bell Atlantic will offer gateway service. Depending on their actual location and physical proximity to the gateway processor, MCI states that these enhanced service providers might be able to implement more efficient access arrangements, but that the plan does not offer them this option. MCI states that, on the contrary, Bell Atlantic would affirmatively penalize independent enhanced service providers who could take advantage of such opportunities by compelling them to interface with the gateway service only through a PAD located in Bell Atlantic's network somewhere in Pennsylvania.[65]

(ii) *Discussion*

41. Although MCI's concerns in this area are not totally clear, it appears to be suggesting that Bell Atlantic has an obligation to minimize transport costs for enhanced service providers outside Pennsylvania by scattering PADs throughout its service region or elsewhere. The Commission has never recognized such an obligation, and it is not a reasonable one, particularly given that the PADs in question are part of Bell Atlantic's unregulated enhanced services rather than its basic network. By taking underlying CEI services at the same rates as its competitors, Bell Atlantic has satisfied this parameter.

V. CEI JURISDICTION AND PRICING

A. *Positions of the Parties*

42. Bell Atlantic provides illustrative tariffs with its Plan.[66] MCI contends that Bell Atlantic must federally tariff its CEI offerings. MCI states that Bell Atlantic acknowledges that enhanced service providers available through the proposed gateway may be located outside the LATAs in which Bell Atlantic will offer gateway service, and argues that it makes no sense to assume that such enhanced service providers will not be located in different states. MCI argues that it is a fundamental jurisdictional principle that exchange facilities that are used to originate or terminate interstate telecommunications services are to be offered pursuant to interstate tariffs. [67]

43. Telenet states that we should mandate federal tariffing of basic services to be used in jurisdictionally interstate services, and that it is reasonable to expect that gateway service will involve both intrastate and interstate transmissions. Telenet argues that it is appropriate for Bell Atlantic to file state and federal tariffs, and contends that federal tariffs will more likely result in services and facilities that are cost-based, uniform, and contain no use/user restrictions. Telenet also states that existing offerings of local exchange business lines or interLATA 800 service need not be federally tariffed at this time, but that newly unbundled functions and features such as Message Desk Service (currently bundled with Centrex, but proposed by Bell Atlantic to be unbundled shortly to permit it to be offered to gateway service and competing enhanced service providers) should be federally tariffed because of their specific CEI/ONA relationship.[68]

44. Bell Atlantic replies that the Commission has already approved CEI plans that include basic services tariffed at the state level, and that interstate tariffs are not required for enhanced services, which are not Title II services under the Communications Act.[69]

2. *Discussion*

45. The Commission is considering the jurisdiction and tariffing issues raised by Bell Atlantic's ONA tariffing proposals in the ONA proceeding. In the interim, and without prejudice to the result in the ONA docket, the Commission has approved CEI plans employing only state tariffing arrangements.[70] We therefore do not require federal tariffing of CEI arrangements as a condition of CEI approval.[71]

VI. OTHER NONSTRUCTURAL SAFEGUARDS

A. *CPNI*

46. The *Phase II Order* established CPNI requirements for the enhanced service operations of AT&T and the BOCs that require them to (1) make CPNI available, upon customer request, to unaffiliated enhanced service vendors on the same terms and conditions that are available to their own enhanced services personnel; (2) limit their enhanced services personnel from accessing a customer's CPNI, if the customer so requests; and (3) notify multiline business customers annually of their CPNI rights. The Commission also required the BOCs, but not AT&T, to provide to unaffiliated enhanced service vendors on the same terms and conditions, any nonproprietary, aggregate CPNI that the BOCs provide to their own enhanced services personnel.[72]

47. Bell Atlantic incorporates by reference the amendments to its ONA plan it filed regarding CPNI on March 10, 1988.[73]

1. *CPNI Notice*

a. *Positions of the Parties*

48. MPC argues that the Commission's CPNI rules favor the BOCs. It claims that Bell Atlantic's proposed CPNI notice fails to explain the usefulness of billing records to an enhanced service provider, ensuring that many respondents will only release service records to competing enhanced service providers. MPC also claims that Bell Atlantic employs biased language in its notice (announcing "exciting" services without so describing the services of its competitors, and using language that suggests the Commission has conferred an exclusive right on Bell Atlantic to offer such services).[74] MCI claims that the type of information sought by Bell Atlantic for its gateway service is different than, and in addition to, that contemplated by the Commission when it established its CPNI procedures, and concludes that it would be appropriate for the Commission to redefine the CPNI criteria to make them relevant to the provision of gateway service.[75]

b. *Discussion*

49. Bell Atlantic proposes to use the CPNI notice and procedures that we recently approved on an interim basis in an order addressing its CEI plan for message storage service.[76] Thus, although MPC claims that Bell Atlantic uses biased language in its CPNI notice, we have already evaluated and approved the notice on an interim basis, and MPC adds no new evidence or arguments that would lead us to reverse that determination. Likewise, MCI suggests that CPNI rules for gateway service must be different, but supplies no convincing rationale. In our view, the Commission did not require the BOCs to send new

service-specific CPNI notices for each new enhanced service that they wish to offer. Such multiple notices are not necessary to inform customers of their CPNI rights, and would tend to confuse customers and be unduly burdensome to customers and carriers alike.

2. *MFJ*

A. Positions *of the Parties*

50. MCI states that Bell Atlantic intends to establish customer profile on each end user that subscribes to its gateway service and claims that the MFJ Court recently found that the collection of such data by the BOCs would "raise very sensitive privacy questions."[77] Until then, MCI states, Bell Atlantic should not be able to compile the types of information described in its plan.[78] Telenet echoes the concern of MCI that the Commission must revise its CPNI rules in light of the conditions imposed by the MFJ Court.[79]

b. *Discussion*

51. Our CPNI requirements pertain only to information about customers' basic network services and their use. We express no opinion on the applicability of the MFJ court restrictions on "user profiles" in this case. We also observe that the Commission has previously declined to modify the CPNI rules as Telenet and MPC advocate.[80] We, of course, are not free to revise that determination in this implementation proceeding.

B. *Nondiscrimination Reporting*

52. The *Phase II Order* required AT&T and the BOCs to file quarterly nondiscrimination reports that provide comparitive data on the timing of installation and maintenance, as well as the quality and reliability, of the basic services offered as part of any CEI tariff. [81] The *Phase II Reconsideration Order* eliminated the quality reporting requirement for AT&T, provided that it (1) amend its ONA plan to include a detailed description of its installation procedures that demonstrates its inability to engage in quality-based discrimination, and (2) submits an annual affidavit attesting that it has followed the installation procedures described in its ONA plan amendments and has not in fact discriminated with respect to the quality of network services offered. The Commission held that if the BOCs could make a similar demonstration, they too would be relieved of the quality reporting requirement, subject to the same conditions applied to AT&T.[82] The *Phase II Reconsideration Order* also modified the installation and maintenance reporting format for AT&T so that it could compare installation and maintenace intervals provided to its enhanced service operations with those provided to a sampling of all customers. The Commission permitted the BOCs to amend their ONA plans to demonstrate that they lacked the ability to discriminate in providing such services. If the BOCs could so demonstrate, the Commission stated that it would modify the installation and maintenance reporting format for them as well.[83]

1. *Positions of the Parties*

53. Bell Atlantic proposes to file quarterly reports that show the percentage of installation orders for which the promised intervals were met, for Bell Atlantic's gateway service and for a sample of all customers, as specified in its attached ONA plan amendments; and the average duration of reported troubles or outages, for Bell Atlantic gateway service and a sample of all customers.[84] ANPA states that the level of detail in Bell Atlantic's proposed reports is insufficient to detect discrimination and urges the Commission to require Bell Atlantic to 1) add information about installation intervals met and trouble duration for specific customer categories; and 2) add information on absolute installation intervals by customer categories as well as the percent of interval promises not met.[85]

2. *Discussion*

54. As discussed above, Bell Atlantic proposes the same nondiscrimination reports as we recently approved for Bell Atlantic's message storage CEI plan. As we did in that case, we approve Bell Atlantic's procedures for this plan on an interim basis, pending any changes adopted by the Commission in its ONA decision.

C. *Disclosure of Network Information*

55. The BOCs must disclose information about network changes or new network services that affect the interconnection of enhanced services with the network.[86]

1. *Positions of the Parties*

56. Bell Atlantic states that it will make no changes to existing network interface specifications in connection with provision of gateway service.[87] ANPA states that the Commission should require that information and technical specifications relating to the PAD-to-central office and PAD-to-enhanced service provider interfaces is included within the network information disclosures required by the Commission.[88]

2. *Discussion*

57. We accept Bell Atlantic's statement that no changes -- and thus no information disclosures -- are necessary for the existing network interfaces that will support gateway services. To the extent that network interfaces are used in the PAD-to-central office and PAD-to-enhanced service provider interfaces that ANPA discusses, our network information disclosure requirements are currently satisfied but will continue to apply. To the extent that ANPA requests disclosure of interfaces between unregulated pieces of equipment, which do not rely on or affect the regulated network, our network disclosure obligations do not apply.

D. *Allocation of Joint and Common Costs*

58. The *Joint Cost Order* adopted rules for the allocation of costs between regulated and unregulated services. The *Phase II Order* requires that BOCs comply with these rules.[89]

1. *Positions of the Parties*

59. Bell Atlantic states that joint and common costs will be allocated pursuant to its Cost Allocation Manual, filed March 14, 1988.[90] MPC argues that only a small proportion of total residential basic users have personal computers with communications capability, so that virtually all costs related to gateway service, at least in the period immediately ahead, will be caused by non-residential customers. MPC states that Bell Atlantic's plan provides insufficient information regarding the allocation of costs, revenues, and investments associated with gateway service

to give the necessary assurances against cross subsidy on which the removal of structural separation was premised. Specifically, MPC claims that Bell Atlantic's Cost Allocation Manual is a highly generalized document that affords Bell Atlantic wide discretion in the treatment of individual costs and urges the Commission to require Bell Atlantic to provide factual annexes indicating the major investments, expenses and revenues in gateway service and how they will be handled in Cost Manual terms.[91]

2. Discussion

60. The Commission has conditionally approved Bell Atlantic's Cost Allocation Manual,[92] which describes how it will allocate investment, such as the type of equipment in issue here, among its various accounts. We find that Bell Atlantic's reliance on its Cost Allocation Manual provides sufficient assuarance that it will not charge the costs of its enhanced services operations to monopoly ratepayers. Moreover, we observe that 60 days prior to implementation of gateway service, Bell Atlantic is required to file any amendments to its Manual reflecting changes to cost categories resulting from introduction of gateway service.[93] In addition, Bell Atlantic is subject to an annual independent audit, attesting that the cost allocation system in place properly implements its manual.[94] Accordingly, we approve this aspect of Bell Atlantic's CEI plan.

VII. OTHER ISSUES

A. *Collocation*

1. Positions of the Parties

61. Telenet expresses concern that CEI implementation may become a substitute for ONA, and believes that while the Commission should approve Bell Atlantic's gateway service plan, it should prohibit collocation of gateway PADs and/or processors with Bell Atlantic's basic facilities, pending approval of Bell Atlantic's ONA plan. It states that Bell Atlantic fails to indicate whether its gateway service trial will be limited to a single LATA or a limited duration. Telenet would not oppose the collocation of gateway PADs in a limited number of LATAs for a limited period (such as one year), but it states that it would be against the Commission's long-range interest in achieving true ONA to grant Bell Atlantic *carte blanc* to collocate gateway PADs for general commercial service throughout its territory.[95]

62. MCI criticizes the Plan to the extent that Bell Atlantic fails to collocate the equipment used to provide gateway service. It states that typically the BOCs seek to avoid the rigors of structural separation in order to collocate equipment used to provide an enhanced service in their central offices. In this case, however, Bell Atlantic does not intend to collocate the gateway processor on its premises, at least initially. Thus, MCI concludes, based on the way Bell Atlantic has designed its proposed gateway service, there is no reason that Bell Atlantic could not offer gateway service on a structurally separated basis.[96]

63. As noted above, Bell Atlantic states that its PADs will be collocated. However, the gateway processor will initially be located on the premises of a third party contractor, but may be located on Bell Atlantic property after the initial trial phase of the service.

2. Discussion

64. Neither Telenet nor MCI provides persuasive justification for prohibiting Bell Atlantic from implementing gateway service as described in its Plan. As discussed *infra* paras. - , we do not agree with Telenet that CEI implementation may become a substitute for ONA. Because Bell Atlantic has satisfied the CEI requirements for gateway service, we permit it to collocate the basic and enhanced facilities that support gateway service. BOC ability to collocate the equipment supporting BOC basic and enhanced services, subject to our safeguards, can result in efficiencies that the Commission contemplated when it adopted the CEI requirements.[97] However, the Commission anticipated a number of efficiencies other than those associated with collocation from the integrated provision of basic and enhanced services, since such integration permits the BOCs to realize scope and scale economies in such areas as research and development, marketing, provisioning, maintenance, and administrative functions. Bell Atlantic's approach, which uses both collocated and non-collocated enhanced service equipment, is not contrary to our policies in this regard.[98] Thus, we disagree with MCI's reasoning in support of retaining structural separation for gateway service.[99]

B. *MFJ*

1. Position of the Parties

65. MCI states that it appears that Bell Atlantic's gateway processor will be located outside the Pennsylvania LATA(s) where gateway service will be offered, in which case Bell Atlantic is not lawfully permitted under the MFJ to furnish interLATA service. In addition, MCI claims, it is not clear whether Bell Atlantic's gateway service would be an efficient form of access, as the court requires.[100]

2. Discussion

66. As the Commission has previously observed in addressing CEI plans, the restrictions imposed by the MFJ court are independent of those imposed by the Commission on the BOCs.[101]

C. *Billing and Collection*

1. Positions of the Parties

67. Bell Atlantic states that it will bill the end user and the enhanced service provider for use of gateway service and will offer to bill end users for the enhanced service provider service. This billing will either be done by a third party contractor or by Bell Atlantic's billing department. In the latter event, billing services will be offered to competing gateway service providers under the same terms and conditions.[102] ANPA states the Bell Atlantic should clarify that its billing services will not discriminate between third-party enhanced service providers and services provided by Bell Atlantic acting as an enhanced service provider.[103]

2. Discussion

68. The treatment of BOC billing and collection for unaffiliated enhanced service providers is presently under consideration in the ONA proceeding. In light of Bell Atlantic's representation that, if it offers billing service, it will provide the service for all enhanced service providers under the same terms and conditions as billing for its

gateway service, we will approve this section of Bell Atlantic's CEI plan pending any modification in the ONA proceeding.

D. *Interexchange Carrier Resale of Gateway Service*

1. *Position of the Parties*

69. ALC states that Bell Atlantic does not appear to permit resale by interexchange carriers of its gateway service. It notes that Bell Atlantic only speaks of billing the end user of enhanced services, and that Bell Atlantic does not allow interexchange carrier-provided gateways to appear as a menu item on its service. ALC states that Bell Atlantic's restriction on IXC resale will make access to enhanced service providers in areas more distant from Bell Atlantic territory more expensive and more difficult. ALC concludes that in order that Bell Atlantic does not unfairly disadvantage interexchange carriers who seek to resell the basic gateway access, it is essential that the basic gateway access be offered under nondiscriminatory interstate tariffs, and that Bell Atlantic must obtain gateway access for its enhanced service offerings under the same tariffed gateway rates as interexchange carriers.[104]

2. *Discussion*

70. Because we find that Bell Atlantic's gateway service is enhanced, Bell Atlantic has no obligation to offer nondiscriminatory access to its gateway service, and we reject ALC's claim. However, if an interexchange carrier also wishes to provide enhanced services, it will be able to take CEI service described in the plan to support its enhanced offerings.

E. *CEI Review Process*

1. *Positions of the Parties*

71. MCI states that it would be inappropriate for the Commission to approve any additional CEI plans at this time. Following approval of their CEI plans, MCI concludes, the BOCs lack incentives to develop and implement more comprehensive and substantive ONA plans. It notes that this is Bell Atlantic's third CEI plan. MCI concludes that the Commission should not approve any CEI plans, including this proposal, until after the BOCs file new ONA plans that are acceptable to the enhanced service provider community.[105]

72. Bell Atlantic responds that if a CEI plan complies with Commission requirements, as Bell Atlantic 's does, then the Commission's own policy mandates that the plan be promptly approved.[106]

2. *Discussion*

73. Parties' concerns that our CEI plan orders will prejudge the results in ONA are misplaced. As we have previously stated,[107] CEI plan review does not determine the outcome of the ONA proceeding. We adhere to the Commission's previous determination that there are "substantial benefits to the public" in providing incentives for carriers to develop and implement both CEI and ONA as early as possible.[108] We do not think the public interest would be served by refusing to process CEI plans because the ONA plans are pending. Indeed, the Commission recognized that the review, approval, and implementation of ONA could be a relatively long-term process and explicitly provided for the filing of CEI plans so that the BOCs could offer specific enhanced services to the public subject to safeguards to prevent anticompetitive conduct by the BOCs, while the ONA process ran its course. Thus, processing BOC CEI plans is fully consistent with the procedures the Commission established for implementing its *Computer III* policies.

VIII. ORDERING CLAUSES

74. IT IS HEREBY ORDERED, that pursuant to Sections 1, 4(i) and (j), 201, 202, 203, 205, 218, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154 (i) and (j), 201, 202, 203, 205, 218, and 405, and 5 U.S.C. § 553, and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, Bell Atlantic's CEI plan for gateway service IS APPROVED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

APPENDIX A

PARTY FILING CEI PLAN

The Bell Atlantic Telephone Companies (Bell Atlantic)

PARTIES FILING COMMENTS

ALC

American Newspaper Publishers Association (ANPA)

MCI

Maryland People's Counsel (MPC)

Southwestern Bell Telephone Company (SWBT)

Telenet

PARTIES FILING REPLY COMMENTS

Bell Atlantic

MPC

FOOTNOTES

[1] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report and Order*, 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC 3035 (1987) (*Phase I Reconsideration Order*), *aff'd on further reconsideration*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration Order*). *See also Report and Order*, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *modified on reconsideration*, FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*).

[2] A list of commenters appears in Appendix A. We use the abbreviations in that appendix throughout this order.

[3] *Ex Parte* Letter, filed June 21, 1988; and Supplemental Information on Bell Atlantic Gateway Service (Supplement), filed June 29, 1988.

[4] Should Bell Atlantic offer gateway service or Comparably Efficient Interconnection (CEI) for gateway service under any conditions other than those approved in this order, it must either amend its Plan or file a new one.

[5] On March 30, 1988, Bell Atlantic also filed a Motion To Permit Unseparated Marketing for gateway service. Because we now approve the Plan for gateway service, the request for interim marketing permission is moot and will not be addressed. Likewise, in approving Bell Atlantic's gateway service at this time, we need not address its request for "expedited consideration". *See* Bell Atlantic Comments at 1.

[6] *Phase I Order*, 104 FCC 2d at 1036, para. 147.

[7] *Phase I Order*, 104 FCC 2d at 1020, para. 115; *Phase I Reconsideration Order*, 2 FCC Rcd at 3042, paras. 49-50. The BOCs must also satisfy the cost allocation requirements of the *Joint Cost Order*, which established compliance filing requirements that are separate from the CEI requirements. *See Joint Cost Order*, 2 FCC Rcd 1298 (1987), *modified on reconsideration*, 2 FCC Rcd 6283 (1987) (*Joint Cost Reconsideration Order*).

[8] Plan at 2. According to Bell Atlantic, gateway service will facilitate access to databases providing business, financial, medical, investment, educational, and entertainment information.

[9] *Id.* at 5. Bell Atlantic states that the gateway processor will maintain for each subscriber, information on the type of terminal the customer plans to use, the ESPs to which the customer has subscribed, the customer's assigned identification numbers, if any, with those enhanced service providers, and the billing method (direct or credit card) the customer has selected. This is information that the customer has provided directly to gateway service and which the customer may change on-line at any time. *Id.* at 3-4.

[10] *Id.* at 3, n. 6.

[11] *Id.* at 3.

[12] *Id.* at 5-6.

[13] ALC Comments at 3.

[14] *Id.* at 5.

[15] Bell Atlantic Reply Comments at 5-6.

[16] Section 64.702(a) of the Commission's Rules, 47 CFR § 64.702(a) (1987).

[17] NYNEX has filed an ONA plan that characterizes a proposed "gateway service" as a basic service. *See* Open Network Architecture Plan of the NYNEX Telephone Companies, CC Docket No. 88-2 Phase I (Feb. 1, 1988); Reply Comments of the NYNEX Telephone Companies, CC Docket No. 88-2 Phase I (May 31, 1988) at Appendix B. *See also* New England Telephone and Telegraph Company, Petition for Waiver of CEI Requirements and to Permit Unseparated Marketing (May 11, 1988). Our finding in this Order that Bell Atlantic's gateway service is enhanced does not prejudge the issue of whether NYNEX's gateway service is enhanced or basic.

[18] ANPA Comments at 3-4.

[19] MPC Comments at 3.

[20] Bell Atlantic Reply Comments at 3.

[21] Supplement at 6.

[22] If Bell Atlantic's gateway service ever achieves a position of market power in this area so that its gateway takes on "bottleneck" characteristics, it might be appropriate for the Commission to consider whether to impose nondiscrimination requirements on such services pursuant to its Title I authority. However, there are a number of existing gateway services, such as those of Compuserve, Genie, and Prodigy, that presumably will compete with Bell Atlantic's gateway. As a new entrant into this marketplace, Bell Atlantic's gateway service does not posess such market power now.

[23] We note as a practical matter that Bell Atlantic has represented that it will not, in fact, discriminate against any enhanced service providers in its provision of gateway services. If there is a change in that undertaking, Bell Atlantic should amend its CEI plan accordingly.

[24] Plan at 4.

[25] *Id.* at 5.

[26] MPC Comments at 3.

[27] ANPA Comments at 4.

[28] *See* Supplement at 6.

[29] *Phase I Reconsideration Order*, 2 FCC Rcd at 3048, para. 92.

[30] *Phase I Order*, 104 FCC 2d at 1039-1043, paras. 154-166.

[31] Supplement at 1.

[32] Bell Atlantic states that Message Desk Service will be unbundled prior to implementation of gateway service and has provided an illustrative tariff for the service. Ex Parte Letter from Donald E. Lavin, Bell Atlantic, to H. Walker Feaster III, Acting Secretary, FCC, (dated August 30, 1988). The other underlying basic services for gateway service are currently unbundled. *See* Plan at Appendix A.

[33] *Id.* at 2. Bell Atlantic states that the PAD used for gateway service is totally dedicated to its enhanced gateway service and is not used in providing PDN or any other service. It states that it need not provide access to the PAD because it is part of the enhanced offering, although it states that the PAD is commercially available.

[34] Plan at 2.

[35] *Id.* at 7.

[36] *Phase I Order*, 104 FCC 2d at 1039-1043, paras. 154-166.

[37] We find that the Plan satisfies the other CEI parameters concerning resale, CEI availability, and CEI recipients.

[38] *Phase I Order*, 104 FCC 2d at 1039, para. 157.

[39] ANPA Comments at 4-5.

[40] Supplement at 2-3.

[41] Supplement at 4.

[42] Of course, we require that the costs associated with these PADs to be allocated to unregulated accounts pursuant to Bell Atlantic's Cost Allocation Manual.

[43] *Phase I Order*, 104 FCC 2d at 1040, para. 158.

[44] Plan at 7. As noted above at note 30, Message Desk Service will be unbundled prior to implementation of gateway service.

[45] ANPA Comments at 5. We discuss ANPA's related contentions regarding billing *infra* at paras. 64-65.

[46] ALC Comments at 5.

[47] *Phase I Order*, 104 FCC 2d at 1041, para. 160.

[48] Plan at 8.

[49] ANPA Comments at 6.

[50] *Phase I Order*, 104 FCC 2d at 1041, para. 162.

[51] Plan at 9.

[52] Mnemonic dialing allows an end user to enter a predetermined code that the PAD then translates and dials. Supplement at 3-4.

[53] Supplement at 3-4.

[54] ANPA Comments at 6-7.

[55] Bell Atlantic Reply Comments at 5.

[56] *Phase I Order*, 104 FCC 2d at 1041, para. 161.

[57] Plan at 9.

[58] ANPA Comments at 6. *See also infra* paras. ---.

[59] Bell Atlantic Reply Comments at 8.

[60] *See* The Bell Atlantic Telephone Companies, Offer of Comparably Efficient Interconnection to Enhanced Service Providers, *Memorandum Opinion and Order*, DA 88-763 (released May 23, 1988) (*May 23 Order*).

[61] *Id.* at para. 12.

[62] *Phase I Order*, 104 FCC 2d at 1042, para. 164.

[63] *Phase II Reconsideration Order*, 3 FCC Rcd at 1155, paras. 32-34.

[64] Plan at 10.

[65] MCI Comments at 8.

[66] Plan at Appendix A. *See also* Bell Atlantic Ex Parte Letter, *supra* n. 30.

[67] MCI Comments at 8-9. *See also* ALC Comments at 5.

[68] Telenet Comments at 9-10.

[69] Bell Atlantic Reply Comments at 8-9.

[70] *See* Pacific Bell and Nevada Bell, Plan for the Provision of Voice Mail Service, Memorandum Opinion and Order, 3 FCC Rcd 1095 (1988) (*Pactel Order); further order*, 3 FCC Rcd 3552 (1988) (*May 23 Order*). The Commission has encouraged the use of existing offerings, including state-tariffed offerings, as components of CEI/ONA. *Phase I Reconsideration* Order, 2 FCC Rcd at 3068, n.261; Phase I Further Reconsideration Order, 3 FCC Rcd at 1141, 1148, n. 93. While not endorsing Telenet's suggestion that new ONA services should be federally tariffed, we note that all of the basic services at issue are either existing services offered under state tariffs or, in the case of Message Desk Service, an existing service to be unbundled from Centrex.

[71] MPC raises various concerns regarding Bell Atlantic's pricing of gateway service for enhanced service providers. While these concerns are not totally clear, we remind MPC that the price for gateway service is unregulated. Our CEI pricing requirements do not apply to the pricing of enhanced services.

[72] Phase II Order, 2 FCC Rcd at 3093-98. In the *Phase II Reconsideration Order*, we declined to require that the BOCs' enhanced service personnel be denied access to CPNI absent prior authorization from customers. 3 FCC Rcd at 1161-63.

[73] Plan at 11-12.

[74] MPC Comments at 8-9.

[75] MCI Comments at 8-9.

[76] *See Second Message Storage Service Order, supra* note 54, where we approved Bell Atlantic's CPNI notice on an interim basis pending evaluation of the notice in the ONA proceeding.

[77] MCI Comments at 9-10, *citing United States v. Western Electric Co.*, Civ. Act. No. 82-0192, n. 40 (D.D.C. March 7, 1988) *(March 7 MFJ Order), further order*, (D.D.C. June 22, 1988). The "MFJ Court" is the U.S. District Court for the District of Columbia that supervises the AT&T consent decree of 1982, better known as the Modified Final Judgment or MFJ.

[78] MCI Comments at 9-10.

[79] Telenet Comments at 8. ANPA incorporates its ONA comment criticisms regarding Bell Atlantic's CPNI procedures. ANPA Comments at 8.

[80] *See, e.g., Phase II Reconsideration Order*, 3 FCC Rcd at 1161, 1163.

[81] *Phase II Order*, 2 FCC Rcd at 3082, para. 73.

[82] *Phase II Reconsideration Order*, 3 FCC Rcd at 1159-60, paras. 66-71, 76-77.

[83] *Id.* at 1160-61.

[84] Plan at 11.

[85] ANPA Comments at 7-8.

[86] *Phase II Order*, 2 FCC Rcd at 3087-88, paras. 107-112.

[87] Plan at 12.

[88] ANPA Comments at 5.

[89] *Phase II Order*, 2 FCC Rcd at 3082, para. 72.

[90] Plan at 10.

[91] MPC Comments at 6-7.

[92] Bell Atlantic Operating Companies' Permanent Cost Allo tion Manual for the Separation of Regulated and Nonregula Costs, 3 FCC Rcd 109 (1988) *(Bell Atlantic CAM Order)*. B Atlantic submitted a revised Cost Allocation Manual pursuan that order on March 14, 1988. "Any revisions to the manual t result from the *[Bell Atlantic CAM Order]* or a subsequent or concerning the revisions will be made effective retroactive January 1, 1988." 3 FCC Rcd at 109, para. 3.

[93] *Bell Atlantic CAM Order*, 3 FCC Rcd at 123, para. 138.

[94] *Joint Cost Order, supra* n. 5, 2 FCC Rcd 1298, 1330-31.

[95] Telenet Comments at 11-12.

[96] MCI Comments at 3-4.

[97] *Phase I Order*, 104 FCC 2d at 1038, para. 152.

[98] Bell Atlantic's motion for unseparated marketing of gate service indicates, for example, its desire to realize market efficiencies. *See supra* note [5].

[99] The *Phase I Order* noted that if a carriers' enhanced serv is offered from a facility that is not collocated with its ba network, but connects to the network through a standard int face, and standard transport facilities are available to the publ under tariff, then "compliance with CEI is relatively simpl *Phase I Order*, 104 FCC 2d at n. 220. This statement suggests th the Commission anticipated the offering of a non-collocated e hanced service by a BOC in developing its CEI rules.

[100] MCI Comments at 6-7.

[101] *See supra* note 77.

[102] Plan at 4.

[103] ANPA Comments at 4.

[104] ALC Comments at 6-7.

[105] MCI Comments at 5-6. Telenet makes a similar claim, in t context of its comments on collocation. Telenet Comments at 1

[106] Bell Atlantic Reply Comments at 10.

[107] *See e.g., May 23 Order, supra* note 67, 3 FCC Rcd at 35 and n. 17.

[108] *Phase I Order*, 104 FCC 2d at 1027, para. 131.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY

Technical Trial of Asynchronous to X.25 Protocol Conversion

MEMORANDUM OPINION AND ORDER

Adopted: September 28, 1988; Released: October 5, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On May 11, 1988, New England Telephone and Telegraph Company (NET) filed a petition for waiver (petition) of the Commission's comparably efficient interconnection (CEI) requirements for protocol conversion, established in *Computer III*,[1] in order to conduct a four-month trial of a videotex gateway service using protocol conversion in the state of Vermont.[2] NET states that if the trial is successful, it will file for authority to perform protocol conversion in Vermont in connection with a permanent packet switching network. [3] On or about June 13, 1988, eleven parties filed comments on NET's petition.[4] ANPA, MCI, and Telenet oppose the petition. ADAPSO takes no position on the whether the petition should be granted, but states that any resolution of the petition should be made without addressing the question of the regulatory status of gateway services as basic or enhanced. Chittenden Bank, Digital Village, General Videotex, Global Villages, Info Now, and VTC support the petition. On June 24, 1988, NET filed reply comments. In this order, pursuant to the authority delegated to us by the Commission,[5] we grant NET's waiver request.

II. SERVICE DESCRIPTION

2. NET states that for purposes of the trial, it has developed a streamlined packet architecture that will integrate protocol conversion, concentration, and packet switching capabilities in a single Siemens Advanced Network Processor (ANP).[6] According to NET, end users and information service providers will communicate via this packet capability.[7] NET says that it will provide what it describes as "basic" gateway functions using a separate computer.

3. NET explains that an end user will reach the gateway by placing a call on the public switched telephone network.[8] Upon reaching the ANP, the end user will enter several characters to set speed and parity parameters. The gateway will then welcome the end user and request an identification number for billing purposes. NET says that after the gateway validates the identification number, the end user will view a directory of information providers.

4. NET says that once the end user selects an information provider from the directory, the call will be routed to that provider in a process analogous to the transfer of a voice call.[9] When the connection between the end user and information provider is established, the connection between the end user and the gateway will be terminated. When the end user completes its session with the information provider, that call will be disconnected and a call between the end user and gateway will be reestablished.[10] At that time, the end user can select another provider from the directory or terminate the call.

5. NET states that the ANP it plans to use in its gateway trial is the same as the ANP described in its Compliance Plan,[11] with new software functionality added to support the gateway.[12] NET says that for purposes of the trial, the ANP will be dedicated to the gateway service and provide access to the gateway, basic packet switching, and protocol conversion. NET states that the ANP will be accessed by standard interfaces to line-side connections off of the circuit switch.[13] NET states that the ANP will be located in Burlington, Vermont, and that the computer on which the gateway software resides will also be located in Burlington.[14]

III. REGULATORY STATUS OF NET'S GATEWAY SERVICE

6. NET states that a videotex gateway can be provisioned as either a basic or enhanced service. According to NET, the key to determining whether a gateway is basic or enhanced is its purpose and the functions it performs.[15] NET says that the gateway it describes in its petition is a basic service because its sole purpose is to facilitate communication between end users and information providers.[16] NET contrasts its proposed gateway with a gateway recently proposed by Bell Atlantic that includes enhanced services such as electronic mail, storage of enhanced service providers' data bases, and asynchronous/X.25 protocol conversion.[17] NET argues that, given these features, Bell Atlantic's proposed gateway service, unlike its own, is clearly enhanced.[18] Despite these arguments, NET says that we need not make a decision on the basic or enhanced nature of the gateway in order to approve the trial. That issue, it says, can and should be addressed in the Commission's Open Network Architecture (ONA) proceeding. NET says it has presented a more detailed analysis in its ONA pleadings.[19]

A. Positions of the Parties

7. ADAPSO objects to NET's characterization of NET's videotext gateway as a basic service.[20] ADAPSO says that, contrary to NET's claims, NET's gateway is plainly enhanced within the meaning of the *Computer III* rules. ADAPSO says that although NET's petition never acknowledges the relevance of the enhanced services definition, its gateway will clearly involve subscriber interaction with stored information and its gateway is therefore, by definition, an enhanced service. ADAPSO attacks NET's contention that NET's gateway service is basic because "[i]ts sole purpose is to facilitate communication between end users and information providers."[21] This, says ADAPSO, is not the standard for enhanced services established in the Commission's rules. ADAPSO states that although NET's petition provides little detail about its proposed service, it is clear that its videotext gateway will,

at a minimum, provide users with an interactive directory of information service providers and thus is an enhanced service.

8. ADAPSO agrees with NET, however, that we need not make a decision on the basic or enhanced nature of the gateway in order to address the merits of NET's petition.[22] ADAPSO says that given the very brief duration of the trial that NET has proposed, and given the "paucity" of information that NET has presented regarding its gateway service, it would be both unnecessary and inappropriate for us to make what clearly will be a precedential decision of great importance. ADAPSO submits that such a decision is better made on the basis of a more definitive proposal and a substantially more complete record.[23]

9. Similarly, Tymnet states that while it does not oppose a brief test under the circumstances and with the safeguards described by NET, it is concerned about NET's assertion that its gateway service is a basic, not an enhanced, service.[24] According to Tymnet, since NET admits that this "basic" service will involve, at the very least, an offering of a directory of data base vendors with which a subscriber will interact, the service will clearly involve subscriber interaction with stored information and under our rules, should be considered an enhanced service.[25] Tymnet claims that NET has failed to support its claim to the contrary.

10. Tymnet says that we should assure that if we grant the waiver we should avoid any implication that the grant reflects agreement with NET's characterization of the regulatory nature of its gateway service.[26] Moreover, Tymnet states that it does not believe that such a fundamental change in our rules should be resolved in the context of an ONA proceeding already "fairly swamped" with substantive issues.[27] Tymnet adds that if NET wishes to seek to change those definitions, NET should file a fully supported petition for Rule Making at the completion of the trial.

11. Telenet states that we should promptly and explicitly reject NET's contention that its proposed gateway service is basic.[28] Telenet says that while NET has not cited authority for its claim that its gateway service is basic, it argues in its ONA reply that when the "sole purpose" of a gateway is to "facilitate communication between end users and information providers," such a gateway is basic, rather than enhanced.[29] According to Telenet, this argument rests upon a misguided attempt to analogize gateway services to various Centrex features found by the Commission to be "basic" by virtue of being "adjuncts" to telephone service.[30]

12. In reply, NET reiterates that we need not make a decision on the basic or enhanced nature of the gateway in order to address the merits of its petition. NET says that it presented a detailed justification for classifying its gateway as a basic service in NYNEX's ONA reply comments and that the most appropriate forum to address the issue is the ONA proceeding.[31] NET states further that it is probable that, by the end of the trial, the Commission will have issued an order on the various Bell Operating Company (BOC) ONA plans and will have addressed the issue of whether videotex gateways can be provisioned as either a basic or enhanced service.[32] The Commission's decision in the ONA proceeding, it says, will determine the form of any later filing in connection with its gateway service.[33]

B. Discussion

13. We agree with NET and ADAPSO that we need no determine whether NET's gateway service is basic or e hanced in order to respond to this waiver request. Th requested trial is quite brief, and NET's present gatewa configuration is experimental and may change during o following the trial. Under these circumstances, without technically "fixed" description of the service, we believ that it is premature to make a binding pronouncement a to its regulatory status that could needlessly restrict i technological development.[34] If NET should choose to fil a CEI plan or an amendment to its Compliance Plan wit a description of a more permanently configured gatewa we can make a determination as to the regulatory cha acter of the service. Such a proceeding would give parties who dispute NET's characterization of its service an op portunity to make their positions known.[35]

14. Finally, as discussed further below, NET has repre sented that, despite its characterization of its gatewa service as basic, it will treat the expenses of conducting the trial in such a manner for accounting purposes that no such expenses are borne by the ratepayer.[36] Accordingly no party will be prejudiced by NET's cost accounting for this trial even if at some later time the gateway service is determined to be enhanced.

IV. THE PROPOSED TRIAL ARRANGEMENTS

15. NET requests that the Commission waive the CEI requirements for X.25 asynchronous protocol conversion.[37] NET states that if a waiver is granted, no party would be prejudiced because it will implement appropriate safeguards for the short duration of its trial.[38] According to NET, the purpose of the trial is to improve the process by which a gateway computer communicates with a packet network and to permit interim unseparated marketing of its proposed gateway services.[39] NET says that Vermont is an optimum site for the trial because it does not currently have a packet switching network, and this will allow it to deploy packet functionality in a controlled environment and not risk bringing down an existing packet network, disrupting customer service.[40] NET says that it will file a CEI plan or an amendment to its Compliance Plan for the protocol processing associated with gateway services, on or before January 1, 1989.[41] At that time, NET says it will inform us of its trial results and seek an extension of the trial until we reach a decision on the January 1, 1989 filing. NET says that if the trial is successful from a technical perspective, it will expand the trial architecture into a permanent packet switching network along the lines described in its ONA Plan.[42]

A. General Waiver Issues

1. Positions of the Parties

16. Chittenden Bank, Digital Village, General Videotex, Global Villages, Info Now, and VTC generally request that the Commission grant NET's petition to allow introduction of information services in Vermont. For example, Chittenden Bank states that it could better serve its customers if it could access gateway services.[43] Digital Village and Global Villages, both information providers, say that access to gateway services would provide an expanded market for their services.[44] VTC says that the proposed gateway service offers the opportunity to expand educa-

tion over great distances and time, thereby improving the access to quality education that is difficult to deliver in rural environments such as Vermont.[45]

17. ANPA states that it is pleased to see NET and the other BOCs attempting to implement gateway services.[46] Nonetheless, ANPA says it is not clear whether the trial proposed by NET will be limited to a brief technical evaluation or whether it is in fact a premature installation of an operational system that would afford NET an unfair competitive headstart.[47] In addition, ANPA says it is troubled that NET has provided virtually no explanation as to why a waiver is appropriate in this case. According to ANPA, when NET provides the explanation for its actions that is currently lacking in its waiver request, ANPA will better be able to evaluate the waiver request and determine whether it is in the public interest.[48]

18. NET replies that we should grant a waiver request "only when unique circumstances are shown and the public interest is served".[49] NET argues that its request presents exactly these circumstances and should be granted.[50] NET reiterates that the trial will allow it to test new gateway software in a manner that will not risk harming an existing packet network and disrupting existing customer service.[51] NET also states that we should not require it to file a CEI plan before the trial is completed because the permanent network architecture for the gateway could be affected by the test, thereby outdating the plan in a few months.[52]

19. MCI contends that during the trial NET ought to be able to meet the minimal safeguards of the *Asynchronous / X. 25 Waiver Order*, as required by *Phase II Computer III*.[53] MCI says that by not even attempting to meet the protocol waiver standards, which are "a form of" CEI, NET implicitly seeks a waiver of them as well.[54] MCI contends that NET's failure to comply with the unbundling, tariffing, and other competitive safeguards typically required for protocol conversion waivers is of even greater concern than is its request to waive CEI requirements. MCI states that although NET speaks of appropriate safeguards, it neglects to discuss any meaningful protections that might replace the CEI or *Asynchronous / X. 25* requirements.[55]

20. MCI argues further that the minimal information that NET has provided in support of its waiver request demonstrates that NET has no technical or other need to provide the service on an unseparated basis.[56] MCI contends there is no reason why NET could not offer the gateway service in Vermont during the trial on a structurally separated basis, since it appears that NET will use a computer for its basic gateway functions separate from the processor providing protocol conversion, concentration and packet switching capabilities. MCI states that NET has also neglected to explain why joint marketing of the service is desirable or more efficient.[57]

21. Telenet argues that NET has failed to indicate which CEI requirements it seeks to have waived, and to what extent the policy objectives of CEI would be met, or frustrated, if the waiver were to be granted.[58] Telenet says while NET states that it will follow accounting and CPNI safeguards during the trial, its waiver request fails to mention the fundamental CEI requirement of comparable interconnection for competing enhanced service providers.[59] Telenet says that NET's failure to address the interconnection issue gives rise to an unavoidable concern that NET may not offer its competitors the same unique access to the gateway ANP that it confers upon itself, or that it will charge its own enhanced gateway service for such access at more favorable rates than competitors.[60] Telenet says that these are the very anticompetitive problems that caused the Commission to adopt CEI requirements in the first place.

22. Moreover, Telenet states that NET's petition cannot be evaluated unless NET amends it to describe how it will offer interconnection to competing enhanced service providers. Telenet says that the relationship of NET's gateway service to its packet switched service is also unclear.[61] Telenet notes that the Compliance Plan stated that end user access to NET's own enhanced services would be on the same terms and conditions as access to competing enhanced service providers, and that NET's enhanced service operation would acquire all of its basic communications services pursuant to existing tariffs.[62] Telenet says that it is "strange" that NET now seeks a CEI waiver for a service that appears to be merely an "additional enhancement" of its already authorized protocol-converted packet service.[63]

23. NET disputes the allegations of MCI and Telenet that it seeks a waiver to avoid having to provide access to other information providers. NET says that it is not trying to avoid regulatory requirements but is only attempting to proceed expeditiously with a temporary trial architecture that does not prejudice its competitors and that will lead to the design of a permanent architecture that comports with the Commission's rules as rapidly as possible.[64] Responding to Telenet's concerns about the Compliance Plan, NET states that we should waive the CEI requirements because competing enhanced service providers will not be prejudiced. Interconnection, it says, will be entirely consistent with the NET Infopath Compliance Plan.[65] NET says that end user access to NET's enhanced services, such as protocol processing, will be on the same terms and conditions as access to those of competing enhanced service providers. It further explains that end users will access its gateway through a local telephone number, without any special dialing arrangements, and that "[a]ll forms of access are currently available to all customers under the same terms and conditions."[66]

24. NET contends that filing a CEI plan for a temporary packet switching and protocol conversion architecture would not provide any additional protection to competing enhanced service providers. [67] NET states that such a filing would, however, delay the trial to the disadvantage of those residential customers who stand ready to subscribe to the service and would frustrate the information providers, particularly the small ones, who wish to offer services in the trial.[68]

2. Discussion

25. Given our decision to defer ruling on the regulatory status of NET's proposed gateway service, its CEI waiver petition for the associated protocol conversion function is procedurally proper, particularly because the petition also describes the proposed gateway service and the safeguards that NET proposes for the trial. We see no conflict between this specific waiver request and the pending Compliance Plan. A CEI waiver is proper in this case, since the *Phase I Reconsideration Order* instructs BOCs seeking service-specific structural relief to follow the procedures established in *Computer III*, which include waiver of the CEI requirements when appropriate, rather than through *Computer II* waivers.[69]

26. While some commenters argue that NET's trial would endanger competition, such claims are speculative and unpersuasive in light of the safeguards that NET proposes for its trial, discussed in section B below, the fact that the basic services used to access the gateway will be taken from currently effective tariffs, and the limited duration of the trial. On the contrary, a waiver permitting this trial to proceed on an expeditious basis is particularly appropriate given the potential utility of gateway service, which, if provided in an efficient manner, could benefit gateway users. The comments of potential users of the service, both information providers and end users, in Vermont support this conclusion.[70]

B. Additional Safeguards

1. Cost Allocation

27. NET says that all costs incurred in planning, implementing, and providing protocol conversion and gateway service will be recorded and tracked. These costs, it says, will be recorded in accounts in accordance with Part 64 of the Commission's Rules and the NYNEX Telephone Companies' Cost Allocation Manual, filed with the Commission on August 14, 1987, and approved (subject to certain modifications) on December 28, 1987.[71] NET says that through Part 64 cost allocation, none of the expenses of conducting the trial and none of the investment in equipment used in providing the enhanced service will be borne by the ratepayer. NET says it will bear these costs.

a. Positions of the Parties

28. MCI states that NET has not indicated how it will tariff its gateway access service during the trial and has not provided detailed information as to cost tracking and allocation.[72] In its reply, NET answers that it is committed to following the Commission's cost allocation requirements.[73]

b. Discussion

29. We approved NET's cost allocation manual subject to a number of conditions and requirements for the submission of further information. Subject to NET's compliance with the conditions that we adopted in our order approving NET's cost allocation manual, we find that for purposes of this trial, NET has complied with *Computer III* cost allocation requirements.

2. Customer Proprietary Network Information

30. NET says that it will continue to honor requests of customers in Vermont to restrict or disclose CPNI.[74] In addition, NET says that personnel who market these services in Vermont will not use CPNI for purposes of the trial without specific customer concurrence.

a. Positions of the Parties

31. MCI states that NET has not provided detailed information in connection with observing customers' confidentiality during the proposed trial.[75] NET replies that it is committed to following the Commission's CPNI procedures.[76]

b. Discussion

32. A full evaluation of NET's CPNI procedures is pending in the ONA proceeding.[77] As an interim measure, we find that the procedures that NET describes in its petition provide substantial assurance that it will not use CPNI improperly over the course of this trial.

3. Nondiscrimination Reports

33. NET states that the short duration of the trial does not warrant provision of quarterly installation and maintenance nondiscrimination reports. If the trial is successful, such reporting requirements, as outlined in NYNEX's ONA Plan, will be incorporated in NET's upcoming filing. No party commented on this safeguard. We find NET's rationale to be reasonable and do not require such reports.

C. Other Issues

1. CEI Review Process

a. Positions of the Parties

34. MCI states that it has repeatedly urged us not to approve any more CEI plans until the ONA plans have been substantially improved. MCI says that if the BOCs are permitted to provide enhanced services on an unseparated basis without meeting ONA requirements, they will have no incentive to develop a comprehensive ONA structure.[78] This trend, it says, is obviously aggravated when a BOC seeks a waiver of CEI safeguards, and worse still when a BOC seeks to waive CEI requirements for a gateway service.[79]

b. Discussion

35. As we have noted in other orders, our evaluation of CEI plans does not determine the outcome of the ONA proceeding.[80] We adhere to the Commission's previous determination that there are "substantial benefits to the public" in providing incentives for carriers to develop and implement both CEI and ONA as early as possible.[81] We do not think the public interest would be served by refusing to process CEI plans in the interim because the ONA plans are pending. Indeed, the Commission recognized that the review, approval, and implementation of ONA could be a relatively long-term process and explicitly provided for the filing of CEI plans so that the BOCs could offer specific enhanced services to the public subject to safeguards to prevent anticompetitive conduct by the BOCs. Thus, processing BOC CEI plans is fully consistent with the procedures the Commission established for implementing its *Computer III* policies.

2. Modification of Final Judgement (MFJ)

a. Positions of the Parties

36. MCI says that the possible locations of the equipment providing the packet capability and gateway service also raises the question of whether NET will be providing an interLATA service in violation of the MFJ. MCI says that NET may not furnish the link between its Vermont network and distant packet and gateway processors, nor may it resell that interLATA service as part of its gateway access offering. MCI says that NET has carefully omitted any information that would reveal whether or not such a violation of the MFJ could occur.[82]

b. Discussion

37. As we have observed in other orders, the restrictions imposed by the MFJ are independent of those which the Commission has imposed on the BOCs in *Computer III*, and we will not interpret the terms of the MFJ in this order.[83]

V. ORDERING CLAUSES

38. IT IS HEREBY ORDERED, that pursuant to Sections 1, 4(i) and (j), 201, 202, 203, 205, 218, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (j), 201, 202, 203, 205, 218, and 405, and 5 U.S.C. § 553, and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, NET's Petition for Waiver of CEI Requirements to Perform Technical Trials of Asynchronous to X.25 Protocol Conversion IS GRANTED, to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Amendments of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report and Order*, 104 FCC 2d 958 (*Phase I Order*), *modified on reconsideration*, 2 FCC 2d 3035 (1987)(*Phase I Reconsideration Order*), *aff'd on further reconsideration*, 3 FCC Rcd 1135 (1988)(*Phase I Further Reconsideration Order*). *See also Report and Order*, 2 FCC Rcd 3072 (*Phase II Order*), *modified on reconsideration*, 3 FCC Rcd 1150 (1988)(*Phase II Reconsideration Order*).

[2] Petition at 1-3. NET says that it will also test whether customers with varying degrees of familiarity with videotex services and data communicationscan effectively use the gateway.

[3] *Id.* at 2. On December 3, 1987, NET filed an Infopath Compliance Plan (Compliance Plan) to demonstrate that its local packet switched service using protocol conversion (known as Infopath packet switched service), complies with all conditions described in the Commission's *Asynchronous / X. 25 Waiver Order*, 100 FCC 2d 1057 (1985). NET's Compliance Plan, which is presently under review, does not presently provide for packet switching or protocol conversion in the state of Vermont.

[4] The following parties filed comments on NET's petition: ADAPSO; American Newspaper Publishers Associations (ANPA); Chittenden Bank; Digital Villages, Inc. (Digital Village); General Videotex Corporation (General Videotex); Global Villages, Inc. (Global Villages); Info Now, Inc. (Info Now); MCI Telecommunications Corporation (MCI); Telenet CommunicationsCorporation (Telenet); Tymnet-McDonnell Douglas (Tymnet); Vermont Technical College (VTC)

[5] *See* 47 C.F.R. §§ O.91 and 0.291 (1987).

[6] Petition at 3.

[7] For purposes of this order, "information service" and "enhanced service" are used interchangeably.

[8] *Id.*

[9] *Id.* at 4.

[10] *Id.*

[11] *See supra* note 3.

[12] Reply at 8.

[13] *Id.*

[14] *Id.* at 8-9.

[15] Petition at 6.

[16] *Id.*

[17] Petition at 7, quoting Bell Atlantic CEI Plan to Provide Gateway Services (The Bell Atlantic Telephone Companies, Offer of Comparably Efficient Interconnection to Providers of Gateway Services, March 30, 1988) at 2. NET says that another difference between the two gateways is that in the Bell Atlantic gateway, the packet assembly/disassembly (PADs) that will perform asynchronous/X.25 protocol conversion will be an integral part of the gateway rather than a part of a separate packet switching network, as in the NET trial gateway.

[18] *Id.*

[19] *See* NYNEX ONA Reply Comments at Attatchment B.

[20] ADAPSO Comments at 2.

[21] NYNEX Comments at 2, quoting Petition at 6.

[22] ADAPSO Comments at 3.

[23] *Id.*

[24] Tymnet Comments at 4.

[25] *Id.*, quoting 47 C.F.R. § 64.702(a)(1987).

[26] *Id.* at 3, 5.

[27] *Id.* at 5.

[28] Telenet Comments at 11. Telenet says that NET has provided no basis for deferring resolution of the "basic vs. enhanced" gateway issue. Telenet says that neither of the safeguards that NET advances -- accounting and CPNI safeguards -- can serve as a substitute for technical interconnection of competing providers to NET's basic services on a "comparably efficient" basis even for a trial period.

[29] Telenet Comments at 8, citing NYNEX ONA Reply Comments at Attachment B.

[30] *See North American Telecommunications Association*, 101 FCC 2d 349 (1985) (*NATA Order*); Telenet Comments at 10. Telenet argues that there is no valid comparison between NET's gateway service and the Centrex adjuncts described in the *NATA Order*. Telenet Comments at 10.

[31] Reply at 9-10. NET states that it would not object to having all basic versus enhanced gateway issues raised in these pleadings incorporated by reference into the ONA proceeding.

[32] *Id.* at 6.

[33] *Id.* at 6-7. NET adds that it will be forced to alter its gateway architecture if the Commission finds all gateways to be enhanced.

[34] We have ruled that Bell Atlantic's proposed gateway service is enhanced. Bell Atlantic Telephone Companies Offering of Comparably Efficient Interconnection to Providing Gateway Services, *Memorandum Opinion and Order*, DA 88-1512 (adopted Sept. 23, 1988). That ruling was necessary because Bell Atlantic filed a CEI plan for the full-scale, integrated offering of a gateway service whose technical and CEI arrangements are fixed, unlike the gateway service for which NET is requesting this limited trial.

[35] If NET does not choose to file either of these plans and for any reason decides to forego offering this service altogether, the ONA record includes pleadings on this issue.

[36] Petition at 8.

[37] Since NET contends that the gateway service is basic, not enhanced, NET does not request a waiver of CEI requirements for that service.

[38] Petition at 2.

[39] *Id.* at 1-2.

[40] *Id.* at 3. NET states that Vermont demographics are appealing as a cite for its trial. According to NET research, 36% of the 200,000 residence households in Vermont have a personal computer -- part of the equipment needed to use the gateway. In addition, NET says that the residential and educational communities in Vermont have expressed strong interest in information services sufficient to provide a base of users for a trial of this service.

[41] *Id.* at 4 n. 2.

[42] *Id.* at 4.

[43] Chittenden Comments at 1-2.

[44] Letter dated June 7, 1988, from J. Franklin Fitzgerald, Managing Director, Village Resources, to H. Walker Feaster, Secretary, FCC; Letter dated June 16, 1988, from Helen M. Murphy, President, Global Villages, to H. Walker Feaster.

[45] Letter dated June 13, 1988, from Harry K. Miller, Dean of VTC, to H. Walker Feaster.

[46] ANPA Comments at 2.

[47] *Id.*

[48] *Id.* at 4.

[49] Reply at 10.

[50] *Id.* at 2-3.

[51] *Id.* at 3-4.

[52] *Id.* at 4-5.

[53] MCI Comments at 4, 8.

[54] *Id.* at 5.

[55] *Id.* at 8.

[56] *Id.* at 6.

[57] *Id.* at 8.

[58] Petition at 6.

[59] For example, says Telenet, it cannot be determined from the petition whether access to NET's gateway ANP will be via tariffed local business lines for which NET will pay tariffed rates, or via some type of specialized access, such as a local access and transport area (LATA) number or abbreviated dialing. Telenet says that the fact that NET seeks a waiver of the CEI requirements implies that NET may intend to use a unique type of dial-up access arrangement for its own enhanced ANP/gateway service. Telenet Comments at 6.

[60] *Id.* at 7.

[61] *Id.* at 4-5.

[62] According to Telenet, NET's petition makes only a passing reference to its pending Compliance Plan, and is utterly silent as to the extent to which its gateway trial will follow the same interconnection principles discussed there. Telenet says that NET does not state whether the proposed gateway ANP is technically the same as that described in its Compliance Plan, nor does it state whether the gateway ANP is to be dedicated exclusively to gateway service, or whether it would also provide PAD functions for its enhanced packet network service. Telenet Comments at 5. As noted *supra* para. 23, NET clarifies its arrangements in its reply.

[63] Telenet Comments at 12. Telenet states that if the gateway ANP described in NET's petition would also provide enhanced protocol conversion for its public packet network, it would seem more logical and expeditious for NET simply to amend its pending Compliance Plan to show that its gateway service will be accessed through its enhanced packet network, and that it will comply with its already-granted waiver of *Computer II* to permit its integrated offering of enhanced packet-switched network service. On the other hand, says Telenet, if the gateway ANP described in the petition is to be dedicated exclusively to the gateway service, NET should file a CEI plan specifically showing how it would meet the CEI requirements in offering this new enhanced service.

[64] Reply at 6.

[65] *Id.*

[66] *Id.* at 8.

[67] *Id.* at 7.

[68] *Id.*

[69] *Phase I Reconsideration Order*, 2 FCC Rcd at 3048, para. 86 and n. 161.

[70] We do not require NET to file a CEI plan at this time since the CEI arrangements that NET might specify in such a plan would change as a result of the trial. Of course, if NET plans to offer the proposed service after the conclusion of its trial, it must file a complete CEI plan for the service after the trial starts.

If NET wishes to extend its trial while its CEI plan for the proposed service is pending, it must request such an extension prior to the scheduled conclusion of the trial in order to permit us adequate time to consider its request.

[71] Petition at 8. *See* NYNEX Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, *Report and Order*, 3 FCC Rcd 81 (1988). Of course, if NET's gateway is eventually determined to be enhanced service, the investment in equipment used to provide that service will have to be properly accounted for as such. We interpret NET's representations in this proceeding to mean that, despite its position on the "basic" nature of the gateway, all the expenses of conducting the gateway trial will be allocated to unregulated accounts.

[72] MCI Comments at 9.

[73] Reply at 5.

[74] Petition at 8.

[75] MCI Comments at 9.

[76] Reply at 5.

[77] We make no findings in this order prejudging that evaluation.

[78] MCI Comments at 3.

[79] *Id.* at 2, 4. MCI states that NET seeks a waiver of CEI precisely so that it can avoid having to provide such access to any other information providers while it tests its own service. *Id.* at 5.

[80] *See* Bell Atlantic Telephone Companies Offer of Comparably Efficient Interconnection to Providers of Gateway Services, *Memorandum Report and Order*, DA 88-1512 (adopted Sept 23, 1988); Southwestern Bell Telephone Company Comparably Efficient Interconnection Plan for the Provision of Voice Messaging Services, *Memorandum Report and Order*, DA 88-1469 (adopted Sept 20, 1988).

[81] *Phase I* Ord er, 104 FCC 2d at 1027, para. 131.

[82] MCI Comments at 9, *see United States v. Western Electric Co.*, Civ. Act.No. 82-0192, n.40 (D.D.C. Mar. 7, 1988) (slip op.)(March 7 Order), *further opinion, Memorandum Opinion and Order*, (D.D.C. June 22, 1988)(slip op.). The "MFJ Court" is the U.S. District Court for the District of Columbia that supervises the MFJ.

[83] *See supra* note 80.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-88-182

Application for authority to acquire and operate additional facilities for service to the Caribbean area, to deactivate the CELTIC System, and to provide direct service to Anguilla

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 30, 1988; Released: October 17, 1988

By the Chief, International Facilities Division:

1. The captioned application, filed on August 5, 1988 by American Telephone and Telegraph Company (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to provide direct service to Anguilla; to supplement and rearrange facilities for service to Antigua, British Virgin Islands, Dominica, Grenada, Montserrat, St. Lucia, St. Vincent, Barbados, French Antilles, Guyana, Netherlands Antilles, St. Kitts and Nevis, and Trinidad and Tobago; and to retire the circuit multiplication system (CELTIC) currently in use with the Second Florida-St. Thomas cable. The application was placed on public notice on August 10, 1988. No comments were received. Upon consideration of the application, we find that authorization of the requested services and facilities is required by the public convenience and necessity. Further, we find that neither the present nor future public convenience and necessity will be harmed by the retirement of the CELTIC system.

2. IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to Anguilla by AT&T. We also find that the proposed acquisition and rearrangement of facilities will serve the public interest.

3. Accordingly, IT IS ORDERED that application File No. I-T-C-88-182 IS GRANTED, and AT&T is authorized to:

a. provide direct service between the U.S. and Anguilla via 18 terrestrial circuits in the Third Florida cable and further extended via St. Thomas-Tortola Analog Microwave System and Analog Eastern Caribbean Microwave System (ECMS);

b. use the St. Lucia earth station in lieu of the Barbados earth station for authorized services to St. Lucia and St. Vincent;

c. use the St. Lucia earth station for authorized services to Grenada;

d. use the Antigua earth station for authorized services to Antigua;

e. deactivate and retire the CELTIC system in the Second Florida cable;

f. make available to Cable and Wireless (West Indies) Ltd. (C&W) on and IRU basis, a one-half interest in 51 voice-grade circuits in the Third Florida-St. Thomas cable, and repurchase the same circuits upon activation of the Transcaribbean Cable System (TCS-1);

g. make available to its correspondent in St. Kitts and Nevis (SKANTEL) on an IRU basis, a one-half interest in nine voice-grade circuits in the Third Florida-St. Thomas cable, and repurchase the same circuits upon activation of TCS-1;

h. activate and use temporarily for its service to C&W locations in the Caribbean area, its interests in 39 voice-grade circuits in the Third Florida-St. Thomas cable presently authorized for service to Brazil, Venezuela and the Netherlands Antilles;

i. acquire on an IRU basis, activate and operate additional half-circuits in the following facilities:

System	No. of Voice - Grade Half - Circuits
St. Thomas - Tortola Analog Microwave System	128
ECM System - Analog	
Northern Section	125
Central Section	73
Southern Section	57
St. Lucia - Barbados Spur	20
Antigua - St. Kitts Spur	5
Antigua - Montserrat Spur	2
Saba - Anguilla Spur	16

j. acquire on an IRU basis, activate and operate half-interest in 64 kbps circuits in the two new digital microwave systems as follows:

System	No. of Half - interests in 64 kbps circuits
St. Thomas - Tortola Digital Microwave System	532
ECM System - Digital	
Tortola - Saba	492
Saba - St. Kitts	474
St. Kitts - Montserrat	444
Montserrat - Guadeloupe	376
Guadeloupe - Dominica	354
Dominica - St. Lucia	331
St. Lucia - St. Vincent	367
St. Vincent - Grenada	220
Grenada - Trinidad	168
Saba - Anguilla Spur	18
Montserrat - Antigua Spur	50
St. Vincent - Barbados Spur	100

k. use the facilities authorized herein to provide AT&T's regularly authorized services between the U.S. on the one hand, and Anguilla, Antigua, British Virgin Islands, Dominica, Grenada, Montserrat, St. Lucia, St. Vincent, Barbados, French Antilles, Guyana, Netherlands Antilles, St. Kitts and Nevis, and Trinidad and Tobago, on the other hand, and beyond.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreements between AT&T and its correspondents in the Caribbean area, and a copy of the agreements shall be filed with the Commission within 30 days of its execution.

5. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-223

In re Applications of

RICHARD P. BOTT, II	File No. BPH-850711MM
RADIO REPRESENTATIVES, INC.	File No. BPH-850711MO
CLARE MARIE FERGUSON	File No. BPH-850712MS
MICHELLE ANDERTON	File No. BPH-850712MV
SANDRA LEE WALTON	File No. BPH-850712MX

For a Construction Permit For a
New FM Broadcast Station
Blackfoot, Idaho

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 1988; Released: October 17, 1988

By the Commission:

1. Before the Commission for consideration are: (1) a Hearing Designation Order, *Richard P. Bott, II*, 2 FCC Rcd 3897 (1987); (2) an application for Review filed July 30, 1987 by Q Prime, Inc; (3) a Petition for Reconsideration filed August 3, 1987 by Rebecca Radio of Idaho; and (4) Oppositions filed August 14 and 18, 1987 by the Mass Media Bureau.

I. BACKGROUND

2. The Bureau dismissed the applications filed by Q Prime and Rebecca Radio for a construction permit for new FM facilities at Blackfoot, Idaho because of inconsistencies in their listed geographic coordinates. Q Prime's and Rebecca Radio's applications were dismissed pursuant to the "hard look" policy for accepting FM applications. *Processing of FM and TV Broadcast Applications*, 50 Fed. Reg. 19936, 58 RR 2d 776 (1985); *Statement of New Policy Regarding Commercial FM Applications that are Not Substantially Complete or are Otherwise Defective (Appendix D)*, 50 Fed. Reg. 19945, 58 RR 2d 166 (1985). At the time of filing, an FM application is reviewed to determine if it is tenderable. Under the "hard look" policy, an FM application will be considered tenderable only if it contains all of the critical elements required for the processing of the application as specified in *Appendix D*. 58 RR 2d at 166. If a critical element is missing from the application, it will be dismissed as defective. If all of the information required by *Appendix D* is contained in the application, it will be accepted for tender. An application accepted for tender is then subjected to a more thorough review to determine if it is in compliance with the Commission's rules and acceptable for filing. Applications not acceptable for filing will be dismissed. *Appendix D*, 58 RR 2d at 169.

3. Rebecca Radio and Q Prime argue that the dismissal of their applications is inconsistent with the treatment accorded applicants in other proceedings. Rebecca Radio further argues that the policies under which its application was dismissed were adopted in violation of the Administrative Procedure Act and that the dismissal of its application conflicts with the Commission's rules. Q Prime argues that the dismissal of its application is inconsistent with the Commission's rules governing the timeliness of amendments, that the error in its application is insignificant, and that dismissal of its application is inconsistent with the Commission's processing policies.

II. DISCUSSION

4. *The "Hard Look" Policy*. In modifying our FM processing procedures, we introduced a tenderability review step to our procedures. This was done in order to eliminate errors in key portions of the applications which previously had remained undetected until considerable processing time and effort had already been expended. *Processing of FM and TV Broadcast Applications*, 58 RR 2d at 782 ¶ 23. To assist applicants in satisfying the new tenderability standards, we issued a detailed list of the criteria to be used in evaluating their applications. *Appendix D*, 58 RR 2d 166. Although applicants might have been allowed to correct such defects in their applications in the past, *James River Broadcasting Corporation v. FCC*, 399 F. 2d 581 (D.C. Cir. 1986), the court now recognizes that stricter acceptability requirements are fully justified because of the influx of broadcast applications and the need to conserve the Commission's resources. *Salzer v. FCC*, 778 F. 2d 869, 871 (D.C. Cir. 1985).

5. *Compliance with the Administrative Procedure Act*. Rebecca Radio argues that the Commission's "hard look" policy cannot be enforced because the Commission adopted the policy without notice of the proposed changes as required by the Administrative Procedure Act. 5 U.S.C. § 553. We reject Rebecca Radio's procedural challenge to the "hard look" policy. First, the notice and public comment procedures are inapplicable to the procedural requirements adopted by the Commission. 5 U.S.C. § 553(b)(3) (A). Moreover, justification for the Commission's action was given by publication of *Processing of FM and TV Broadcast Applications*, 50 Fed. Reg. 19936 (May 13, 1985). Rebecca Radio should have presented its procedural arguments by a petition for reconsideration of that action. *Joanne Brehm*, 1 FCC Rcd 403, 404 ¶¶ 8-9 (1986); *Star Signal Corp.*, 1 FCC Rcd 450, 451 ¶¶ 8-10 (1986).

6. *Compliance with the Commission's Rules*. Rebecca Radio also argues that the dismissal of its application is contrary to 47 C.F.R. §§ 73.3564(b) and 73.3566. It asserts that the Bureau did not find that Rebecca Radio's application was "patently not in accordance with the FCC rules, regulations, or other requirements" as is required for the dismissal of an application. We find that Rebecca Radio's argument is without merit. *Appendix D* specifically requires an accurate showing of geographic coordinates as a requirement for acceptability. 58 RR 2d at 167-68. We agree with the Bureau that, because there are unresolved discrepancies in Rebecca Radio's geographic coordinates,

its application was "patently not in accordance with the . . requirements" of *Appendix D*. Therefore, Rebecca Radio's application was properly dismissed.

7. *Timeliness of Q Prime's Amendment*. Acceptance of an application as tenderable triggers a 30-day period during which an application can be amended as of right. 47 C.F.R. § 73.3522(a)(2); *Processing of FM and TV Broadcast Applications*, 58 RR 2d at 784 ¶ 31. On November 25, 1985, Q Prime's application was returned as unacceptable because of an error in Q Prime's computation of its transmitter's height above average terrain (HAAT), even though the defect had been corrected. On March 4, 1986, Q Prime filed an amendment correcting separate errors in its geographic coordinates. On December 22, 1986, the Bureau recognized that Q Prime had corrected the error in its HAAT, and it reinstated Q Prime's application "for further acceptability review." The Bureau in its December 22 order further held, however, that Q Prime's March 4 amendment correcting Q Prime's geographic coordinates was untimely. The Bureau, therefore, again dismissed Q Prime's application because of the error in its original specification of geographic coordinates. Q Prime argues that the December 22 reinstatement of its application triggered a further 30-day period under which it could amend its application as of right, and that the Commission should therefore accept the previously filed March 4 amendment correcting its geographic coordinates.

8. Q Prime's contentions are not persuasive. On August 13, 1985, the Commission issued a public notice of the tenderability of Q Prime's application. The public notice triggered a 30-day period during which Q Prime could amend its application. Q Prime failed to correct its geographic coordinates during that amendment period. The December 22, 1986 action corrected an acceptability ruling and reinstated Q Prime's application as of the date of its original filing, but it did not trigger a new 30-day period for amendments. The "hard look" procedures only allow for a late amendment if an application initially found nontenderable and not listed for a 30-day amendment period is reinstated or if a mutually exclusive applicant is granted a late amendment. *Processing of FM and TV Broadcast Applications (Reconsideration)*, 59 RR 2d 100, 102 ¶ 6 (1985). Applicants are expected to correct defects during the initial amendment period after acceptance as tenderable. We specifically considered the concept of allowing subsequent curative amendments, but rejected it because permitting "curative amendments after that period poses too great a threat to the orderly functioning of our new processing procedures." *Processing of FM and TV Broadcast Applications*, 58 RR 2d at 785 ¶ 32. Thus, allowing applicants to amend every time the Commission reconsiders the dismissal of an application would unduly delay proceedings and undermine the efficiencies derived from the Commission's "hard look" approach to the processing of FM applications.

9. *Q Prime's Geographic Coordinates*. As originally filed, the longitude listed as part of the geographic coordinates on Q Prime's application did not match the coordinates plotted on the 7.5 minute map submitted with the application. Q Prime argues that the error in its geographic coordinates is minor and that its application was substantially complete even with the error. It asserts that the error amounted to about 10 seconds longitude or approximately 800 feet, and that the error is not critical because both the correct and incorrect coordinates comply with the Commission's technical engineering criteria.

10. Under the "hard look" policy, applicants are required to show their proposed geographic coordinates to the nearest second. If there are errors in engineering data which cannot be resolved on the face of an application, the application will be returned or dismissed. 58 RR 2d at 167-69. Granting exceptions would require the staff to examine individual applications to determine the significance of the conflicting data and would again detract from the efficiencies in processing to be achieved from the "hard look" policy. We therefore agree with the Bureau that Q Prime's failure to specify geographic coordinates accurate to the nearest second was a critical factor and that this deficiency warranted dismissal of its application.

11. *Compliance with the Goals of the "Hard Look" Policy*. Q Prime argues that it corrected the errors in its geographic coordinates before any questions were raised concerning the accuracy of those coordinates. It asserts that, if the amendment had been accepted by the Bureau, its application could have been processed without delaying the hearing and that the dismissal of its application reduces the pool of competing applicants without actually conserving Commission resources or speeding service to the public.

12. Q Prime's argument is unpersuasive. Although it is desirable to have as many qualified applicants as possible from which to select a broadcast licensee, we now "place greater emphasis on providing service to the public in the most efficient, expeditious manner possible" and consideration of flawed proposals can inordinately delay the initiation of new service. *Mathew D. Wiggins, Jr.*, 1 FCC Rcd 401, 402 ¶ 8 (1986). The ability to increase the pool of eligible applicants by retaining a flawed application does not provide a basis for departure from the "hard look" doctrine. The "hard look" approach was adopted to expedite the processing of broadcast applications while conserving the Commission's resources. This permits the Commission to make a more efficient use of its processing staff. *Star Signal* Corp., 1 FCC Rcd at 451 ¶ 7. A precedent allowing belated amendments would undermine the purposes of the 30-day window for amendments and the efficiencies to be derived from the "hard look" procedures.

13. *Treatment of Similarly Situated Applicants*. Rebecca Radio and Q Prime cite a number of proceedings in which, they allege, the Mass Media Bureau accorded disparate treatment to similarly situated applicants.[1] In each of the cited cases, it is true that the Bureau accepted amendments after the 30-day amendment period. None of these rulings, however, requires reinstating the dismissed applications in this proceeding.

14. The Bureau asserts that the amendments in these cases were allowed in compliance with the exceptions set forth in Appendix D, 58 RR 2d at 169, and Processing of FM and TV Broadcast Applications (Reconsideration), 59 RR 2d at 102 ¶ 6. We find no basis to disagree with this contention. To the extent, however, that there may be some cases in which the Bureau has seemingly departed from the "hard look" approach, it is important to note that adversely affected parties may still raise questions about those cases at an appropriate time. Thus, any such cases do not involve final or otherwise binding rulings as far as our consideration of this case is involved. Under these circumstances, neither Q Prime nor Rebecca Radio has presented any reason for a different result in this case. As set out in the Hearing Designation Order, the applica-

tions filed by Rebecca Radio and Q Prime were not substantially complete under the "hard look" policy and they were properly dismissed by the Bureau.

15. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed July 30, 1987 by Q Prime, Inc. and the Petition for Reconsideration filed August 3, 1987 by Rebecca Radio of Idaho, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTE

[1] Warren Price Communications, Inc., 2 FCC Rcd 4201 (1987); Rebecca Broadcasting Corp., 2 FCC Rcd 3476 (1987); Rebecca Radio of Marco, 2 FCC Rcd 4053 (1987); Key Broadcasting Corp., 2 FCC Rcd 3888 (1987); and Pyramid Broadcasting Corp., 2 FCC Rcd 3285 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

Local Exchange Carriers'
Individual Case Basis
DS3 Service Offerings

SUPPLEMENTAL ORDER DESIGNATING ISSUES FOR INVESTIGATION

Adopted: October 6, 1988; Released: October 17, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On March 28, 1988, we released a *Designation Order* [1] initiating an investigation of a number of local exchange carriers' (LECs') proposed rates and charges for Special Access Individual Case Basis (ICB) rates for DS3 and DS3-equivalent services. The Bureau designated for investigation issues concerning the LECs' continued use of ICB rates, and established a pleading cycle. That Order also granted the LECs special permission to advance the effective date of their transmittals, which became effective subject to the outcome of the investigation.

2. Several LECs whose transmittals became effective pursuant to our *Designation Order*, as well as a number of LECs whose transmittals became effective pursuant to later Orders in this docket, proposed revisions, *inter alia*, establishing rates and charges for single mode "dry" (or "dark") fibers[2] on an individual case basis. Since these proposed offerings appeared to be "DS3-equivalent services," those transmittals became effective subject to the outcome of the investigation instituted in this proceeding.

II. DESIGNATION OF ISSUES TO BE INVESTIGATED

3. We have determined that, in order to facilitate our resolution of the pending investigation of the LECs' continued use of ICB rates, we need to examine the question of whether the provision of dry fiber cable should be distinguished from the provision of DS3 and DS3-equivalent services for purposes of investigation. Accordingly, any LECs whose filings proposed rates and charges for the provision of dry fiber cable are requested to respond as follows:

(1) Explain whether the provision of dry fiber cable could or should be distinguished from the provision of DS3 and DS3-equivalent services with respect to the use of ICB rates.

(2) Provide responses to the issues set out in the *Designation Order*, 3 FCC Rcd at 2582, as applied to the provision of dry fiber cable.

(3) If you contend that the issues in the *Designation Order* do not apply to the provision of dry fiber cable, provide a detailed explanation to support your position.

III. PROCEDURAL REQUIREMENTS

4. We require each affected LEC no later than November 1, 1988, to file a direct case addressing the issues outlined above. In their direct cases, LECs must answer each specific question listed in Section II, *supra*. Moreover, each LEC's direct case must supply all information upon which the LEC relies to support its position. Pleadings opposing the direct cases may be filed by interested parties no later than November 14, 1988, and must be captioned "Opposition to Direct Case" or "Comments on Direct Case." Any affected LEC may file a "Rebuttal" to oppositions and comments no later than November 21, 1988. All pleadings must be organized to reflect the issues designated in this Order.

5. An original and seven copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial copying firm, International Transcription Service, Inc. (ITS), Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Members of the general public who wish to express their views in an informal manner regarding ICB rates for dry fiber cable may do so by submitting one copy of their comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554.

6. *Ex parte* contacts (*i.e.*, written or oral communications which address either the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until a public notice of scheduled Commission consideration of a final Order is released and after the final Order itself is issued. Written *ex parte* contacts must be filed, on the same day submitted, with the Secretary for inclusion in the public file. A written summary of oral *ex parte* presentations must be served, on the same day presented, on the Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200 *et seq.* of the Commission's Rules, 47 C.F.R. § 1.1200 *et seq.*

IV. ORDERING CLAUSE

7. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201-205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201-205, and 403, and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the issues set forth in Section II, *supra*, ARE DESIGNATED FOR INVESTIGATION in CC Docket No. 88-136.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (1988) (*Designation Order*).

[2] "Dry" or "dark" fiber is unpowered. The provision of dry fiber cable does not involve supplying the electronics which will eventually power the cable.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-79

In the Matter of

Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies

ORDER

Adopted: October 6, 1988; Released: October 17, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On July 19, 1988, US West filed a petition for interim waiver seeking permission to use procedures for protecting restricted customer proprietary network information (CPNI) that differ from those approved for it in the *BOC CPE Plans Order*.[1] US West proposes to use these alternative procedures for approximately nine months. We grant this petition for interim relief and permit US West to use the procedures it proposes until April 19, 1989.

II. BACKGROUND

2. In the *BOC CPE Order*,[2] the Commission relieved the Bell Operating Companies (BOCs) of the structural separation requirements governing their provision of customer premises equipment (CPE) and replaced those requirements with nonstructural safeguards. The Commission required the BOCs to submit plans describing how they would comply with these safeguards and delegated authority to the Chief of the Common Carrier Bureau (the "Bureau") to review these plans. The safeguards adopted in the *BOC CPE Order* include a requirement that if a customer requests, BOCs must restrict access to that customer's CPNI to network services personnel who have no involvement in CPE sales.

3. In its compliance plan, filed April 13, 1987, US West proposed to protect restricted CPNI by "modify[ing] the software systems which maintain the CPNI so that a password would be required to obtain access to the CPNI of the customers who wish to restrict access." [3] The Bureau approved this plan in the *BOC CPE Plans Order*.[4]

III. US WEST'S PETITION

4. In its petition, US West claims that it will not be able to complete the software modifications necessary to implement its CPNI restriction system until the end of March 1989.[5] It seeks permission to implement alternative security methods during the interim period so that it may begin using unrestricted CPNI in its integrated marketing of CPE and network services.

5. US West proposes two methods for protecting CPN during this interim period – one applicable to employee that target their marketing efforts to residential and sma business customers, and the other applicable to employee that tend to market on an integrated basis to large bus ness customers. In both cases, US West would place th notation "access denied for CPE sales," or a simila phrase, on the data base records of customers that reque restricted treatment of their CPNI. Employees in uni that target residential and small business customers woul be permitted to access data base systems containing CPNI but would be prohibited from "representing, promotin or selling CPE" to any customer whose record wa marked.[6] Employees that tend to market CPE to larg business customers would be denied access to on-line sy tems containing CPNI, but would be able to obtain un marked CPNI records in hard copy form from personne who deal only with network services.[7]

6. US West claims that the two interim methods i proposes "are not dissimilar from methods already approved in the CPNI plans of other BOCs and therefore presumably provide an acceptable level of confidentiality for restricted customer accounts."[8] It further claims that granting the waiver it seeks would allow customers to benefit from the increased availability of efficient, integrated CPE/network service solutions.[9]

7. The only party to file comments on US West's petition was BellSouth. BellSouth urges us to approve the petition.

IV. DISCUSSION

8. We grant US West's petition and permit it to use its proposed alternative procedures for protecting restricted CPNI until April 19, 1989.[10] These procedures are sufficient to ensure that, during the waiver period, the CPNI of customers who request restricted access will be protected in accordance with the Commission's requirements. This relief will also enable US West to offer interested customers the efficiencies of integrated marketing without undue delay. As of April 19, 1989, US West must implement the procedures for protecting CPNI described in its compliance plan and approved in the *BOC CPE Plans Order*.

V. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED, that pursuant to Sections 4(i), 4(j), 201-205, 218, 220, 403, and 404 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201-205, 218, 220, 403, and 404, and authority delegated thereunder pursuant to Sections 0.91(h) and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91(h) and 0.291, and the *BOC CPE Order*, 2 FCC Rcd 143 (1987), *modified on reconsideration*, 3 FCC Rcd 22 (1988), the petition for interim waiver filed by US West is GRANTED to the extent specified herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, 3 FCC Rcd 412 (1988).

[2] Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, *Report and Order*, 2 FCC Rcd 143 (1987), *modified on reconsideration*, 3 FCC Rcd 22 (1988).

[3] US West Compliance Plan, Procedures for Customer Proprietary Network Information at 3.

[4] *See* 3 FCC Rcd at 414.

[5] US West Petition at 5.

[6] *Id.* at 7. US West also proposes to use this method on a permanent basis in "remote offices where it is uneconomical to maintain a separate network-only work force." *Id.* at 8, n. 17.

[7] Presumably, this would not include employees in remote end offices. *See supra* note 6.

[8] US West Petition at 7.

[9] *Id.* at 6.

[10] April 19, 1989, is nine months from the date US West filed its petition. We emphasize that this is a grant of interim relief only. If US West wishes to seek a permanent modification of its CPNI requirements for "remote" offices, it should file an amendment to its CPE compliance plan specifying the changes it seeks and the reasons therefor.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Jody Barnes File No. 1134-CM-P-83

For Authority to Construct and Operate
a Multichannel Multipoint Distribution
Service station on the E-group channels
to serve the New Haven, Connecticut area

MEMORANDUM OPINION AND ORDER

Adopted: September 28, 1988; Released: October 17, 1988

By the Chief, Domestic Facilities Division:

1. This proceeding concerns a Petition to Deny challenging the above-referenced application of Jody Barnes (Barnes) for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels to serve the New Haven, Connecticut area. The Commission selected Barnes' MMDS application for qualification review as the result of a lottery. Microband Corporation of America (Microband) filed a post-lottery Petition to Deny Barnes' application. Barnes filed an Opposition to this Petition to Deny.

2. Microband alleged in its Petition to Deny[1] that Barnes, along with eleven other MMDS applicants[2], engaged in an orchestrated attempt to skew the Commission's lottery proceedings by the coordinated and systematic filing of virtually identical applications. All twelve of these applicants filed applications for New Haven. Microband contends that the events leading up to the filing of these "cookie-cutter" applications, the familial or business relationships among certain applicants, the central role that at least two of the applicants played in the preparation of the applications, and the similarities in technical and other information among the applications should lead the Commission to conclude that Barnes failed to disclose the identity of the real-parties-in-interest to her application in violation of Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a); and filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), known as the one-to-a-market rule. Microband also contends that Barnes has not adequately demonstrated her financial qualifications to be an MMDS licensee in violation of Section 21.17 of the Commission's Rules, 47 C.F.R. § 21.17.

3. In her Opposition, Barnes relied upon her sworn affidavit and the statement of Thomas Glab to support an assertion that she has not violated the real-party-in-interest and one-to-a-market rules. Responding to the allegation that she failed to adequately demonstrate her financial qualifications to construct and operate the above-referenced MMDS station, Barnes submitted her own financial statement, her parents' financial statement, and a loan agreement with her parents.

4. None of these allegations by Microband is unique to this particular proceeding concerning Barnes' application to construct and operate an MMDS station in New Haven. These allegations, as applied to Barnes, were considered and rejected by the Commission in *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987). For the reasons provided in that decision, we deny Microband's Petition to Deny with regard to the allegations concerning violations of the real-party-in-interest rule and the one-to-a-market rule.

5. Microband has also challenged Barnes' financial qualifications to be an MMDS licensee. In consideration of our review of the financial demonstration submitted by Barnes, we conclude that she has not adequately demonstrated her financial qualifications pursuant to Section 21.17. However, the Commission in *Revision of Part 21 of The Commission's Rules*, 2 FCC Rcd 5713 (1987), revised Section 21.17 to allow applicants to submit a financial certification of their ability to meet estimated construction costs and operating expenses for a period of one year.[3] In this Rule Making order, the Commission established the policy that "those applicants whose applications are deficient with regard to this information [financial data demonstrating financial ability to construct and operate the proposed facility], and thus subject to dismissal, need file a financial certification statement, as prescribed by the new rules." *Id.* at 5752-53 n. 57. Therefore, pursuant to Commission policy, Barnes will be required to submit a financial certification within fifteen (15) days of the release date of this order. Failure to submit the financial certification within fifteen days may result in the dismissal of the above-referenced application.

ORDERING CLAUSE

6. ACCORDINGLY, IT IS ORDERED that the Petition to Deny filed by Microband is hereby DENIED to the extent set forth above. IT IS FURTHER ORDERED that Jody Barnes shall submit a financial certification pursuant to 47 C.F.R. § 21.17 within fifteen (15) days of the release date of this order.

7. This order is issued pursuant Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b) of the Commission's rules, 47 C.F.R. § 1.4(b).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan, Chief
Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In its Petition to Deny, Microband incorporated by reference the pleadings it filed in *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987).

[2] The eleven other applicants are Edna Cornaggia, Sherry Rullman, Warren Ache, Stephanie Engstrom, Thomas Glab, Jack G. Hubbard, Joseph W. Hubbard, Theodore D. Little, Kevin Rullman, Steven Rullman, and David Wiechman.

[3] It should be emphasized that the financial certification requirement does not abrogate the requirement that an applicant demonstrate that it is financially qualified. However, the new Section 21.17 changes the manner in which such demonstration is made.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Mountain States Telephone and Telegraph Company: Preemption of and Jurisdiction over Tax Reserves and Investment Tax Credits Transferred to AT&T and Affiliated Companies

MEMORANDUM OPINION AND ORDER

Adopted: September 15, 1988 Released: September 27, 1988

By the Commission:

1. On February 19, 1985, the Mountain States Telephone and Telegraph Company (Mountain Bell) filed a petition requesting a declaratory ruling that this Commission has jurisdiction over, and has preempted state and local regulation of, the transfer of all assets made pursuant to the *Modification of Final Judgement (MFJ)*. [1] Mountain Bell's petition also requested a declaration that certain actions of the New Mexico State Corporation Commission (New Mexico Commission) and the Idaho Public Utility Commission (Idaho Commission) involving the treatment of deferred tax reserves and unamortized investment tax credits associated with embedded customer premises equipment (CPE) and interexchange facilities transferred pursuant to the *MFJ* from Mountain Bell to the American Telephone and Telegraph Company (AT&T), or one of its subsidiaries, were inconsistent with certain of this Commission's policies and orders. On January 7,1988, we issued the *MSTT Order* in which we concluded that our policies for the detariffing of embedded CPE preempted contrary state treatment of the tax accounts associated with such CPE transferred to AT&T from the Bell Operating Companies (BOCs) as part of the AT&T divestiture. [2] The State of Idaho sought review of the *MSTT Order* in the United States Court of Appeals for the Ninth Circuit (Ninth Circuit).

2. In response to a motion of this Commission, the Ninth Circuit on March 11, 1987, partially remanded the appeal to us for a sixty day period to permit us to review the *MSTT Order* in light of the decision of the United States Supreme Court in *Louisiana Public Service Comm. v. FCC (Louisiana)*. [3] On remand, we concluded that the Idaho Commission's requirement that, for intrastate ratemaking purposes, Mountain Bell amortize an amount equal to the intrastate portion of deferred tax reserves associated with embedded CPE transferred from Mountain Bell to AT&T Information Systems does not create the conflict with federal policies necessary to invoke our authority to preempt.[4] Therefore, we concluded that Mountain Bell's petition should be denied, [5] although we did not vacate the *MSTT Order*.

3. Following our decision on remand, the Ninth Circuit issued an order dismissing the appeal and directing us to vacate the *MSTT Order*. [6] In compliance with the order of the Ninth Circuit, we vacate the *MSTT Order*.

4. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 201-205, 214, and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 151, 154(i), 201-205, 214, and 220, that our decision in *Mountain States Telephone and Telegraph Preemption of and Jurisdiction over Tax Reserves and Investment Tax Credits Transferred to AT&T and Affiliated Companies* FCC 86-11 (released Jan. 7, 1986), IS VACATED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] United States v. Telephone and Telephone Co., 552 F. Supp 131 (D.D.C. 1982), *affirmed sub nom.* Maryland v. United States, 460 U. S. 1001 (1983).

[2] Mountain States Telephone and Telegraph Company Preemption of and Jurisdiction over Tax Reserves and Investment Tax Credits Transferred to AT&T and Affiliated Companies, FCC 86-11 (released Jan. 7, 1986).

[3] 106 S.Ct. 1890 (1986). *Louisiana* held that this Commission does not have preemptive authority over state-imposed depreciation schedules that are used for purposes of computing intrastate rates.

[4] Mountain States Telephone and Telegraph Company Preemption of and Jurisdiction over Tax Reserves and Investment Tax Credits Transferred to AT&T and Affiliated Companies, FCC 87-182 (released May 11, 1987).

[5] During the pendancy of the appeal, the issues relating to the action of the New Mexico Commission became moot as a result of an adverse ruling by the New Mexico Supreme Court. Mountain States Telephone and Telegraph Co. v. New Mexico State Corporation Commission, No. 15365 (N.M. Mar. 17, 1986).

[6] State of Idaho v. FCC, No. 86-7047 (9th Cir. Dec. 2, 1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY
AT&T OF PUERTO RICO, INC.
MCI INTERNATIONAL, INC.
RCA GLOBAL COMMUNICATIONS, INC.
US SPRINT COMMUNICATIONS COMPANY
WU WORLD COMMUNICATIONS, INC.

Joint Application for Authorization Pursuant to Section 214 of the Communications Act of 1934, as Amended, to: (A) Construct the Transcaribbean Cable System; (B) Assign Capacity in that Cable System; (C) Acquire Overseas Extension Facilities; (D) Grant Capacity to Foreign Telecommunications Entities and (E) Activate and Operate these Facilities.

File No. I-T-C-88-071

MEMORANDUM OPINION, ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 14, 1988 Released: September 15, 1988

By the Chief, Common Carrier Bureau:

INTRODUCTION

1. We are here considering the above-captioned joint application filed on February 9, 1988 by several United States International Service Carriers (USISCs)[1] requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. §214 (1987), to construct the Transcaribbean cable system (TCS-1), a digital, optical fiber cable proposed to extend from the United States mainland to Puerto Rico and then to the Dominican Republic, Jamaica and Columbia. The USISCs also request authority to assign capacity in TCS-1, acquire capacity in certain extension facilities required to extend TCS-1 capacity to destination countries on both a lease and an indefeasible right of user (IRU) basis, and grant capacity in TCS-1 to foreign administrations on an IRU basis.

2. The subject application was placed on public notice on February 17, 1988. On March 17, 1988, the Puerto Rico Planning Board (PRPB) filed a letter indicating its intent to review the proposed TCS-1 cable system for consistency with the Puerto Rico Coastal Management Program pursuant to Section 307(c)(3)(A) of the Coastal Zone Management Act, 16, U.S.C. §1456(c)(3)(A).[2] The Puerto Rico Telephone Company (PRTC) filed a pleading entitled "Comments and Motion for Consolidation of the Puerto Rico Telephone Company" on March 17, 1988. [3] Caribbean Automated Long Lines Services, Inc. (CALLS) filed comments on March 21, 1988. On March 31, 1988, the USISCs filed an opposition and motion to strike. PRTC filed reply comments on April 12, 1988. On July 21, 1988, AT&T filed a letter enclosing a copy of the PRPB's July 19, 1988 certificate concurring with AT&T's certification that the proposed TCS-1 cable system complied with Puerto Rico environmental requirements. On August 16, 1988, PRTC filed a pleading entitled "Contingent Withdrawal of Comments and of Motion for Consolidation of the Puerto Rico Telephone Company."

DESCRIPTION OF FACILITIES

3. The TCS-1 cable system, as defined by the initialed Construction and Maintenance Agreement (C&MA) appended to the application, will consist of: (a) 2880 minimum assignable units of ownership (hereinafter MAUOs or 64 kilobit per second (kb/s) circuits)[4] in the proposed Florico-2 cable system between Florida and Puerto Rico;[5] (b) a digital, optical fiber cable having two traffic bearing fiber pairs, each operating at 140 megabits per second (mb/s) between Puerto Rico and an undersea branching repeater where one of the fiber pairs will be routed to Colombia and the other fiber pair to the Dominican Republic; (c) a digital, optical fiber cable having a single traffic bearing fiber pair with a design capacity of 140 mb/s but which will be equipped to operate at 45 mb/s[6] between the Dominican Republic and Jamaica; and (d) cable terminals associated with the cable located at: West Palm Beach, Florida; San Juan, Puerto Rico; Santo Domingo, Dominican Republic; Barranquilla, Colombia; and Kingston, Jamaica.[7]

4. Each segment of the TCS-1 cable will be capable of providing the following number of MAUOs and, if fully equipped with Digital Circuit Multiplication Systems (DCMS) providing a 5-to-1 circuit multiplication ratio on MAOUs used for voice services, would provide the indicated number of equivalent voice paths:[8]

TCS-1 SEGMENT	NO. OF MAUOS	NO. OF EQUIVALENT VOICE PATHS
Florico-2	7560	37,800
Portion of Florico-2 Ceded to TCS-1	2880	14,400
Puerto Rico-Dominican Republic	1890	9,450
Puerto Rico-Colombia	1890	9,450
Dominican Republic-Jamaica	630	3,150

5. The USISCs indicate that the total cost of the TCS-1 cable system is projected to be approximately133.5 million.[9] This total cost is distributed as follows:

SEGMENT OF TCS-1	COST MILLIONS
F[10]	30.5
G-1	28.0
G-2	3.8
G-3	21.2
G-4	41.0
Total Transmission Portion	124.5
Route Survey and Administration[11]	6.0

Cable Stations (Segments A,B,C, D and E)	3.0
TOTAL	133.5

These capital costs, as well as the maintenance and operating costs for each segment of the cable are allocated among the TCS-1 owners[12] on a *pro rata* basis as shown in Schedule C appended to the C&MA which is attached to this decision as Appendix 2. Schedule B appended to the C&MA showing the voting interests in the TCS-1 cable is also attached to this decision as Appendix 1.

6. TCS-1 and the extension facilities requested will be used to supplement the Applicants' existing facilities[13] in the provision of service between points in or reached via the United States mainland and points in or reached via Antigua, Barbados, the British Virgin Islands, Colombia, Dominica, the Dominican Republic, the French Antilles, Grenada, Haiti, Jamaica, Montserrat, the Netherlands Antilles, Panama, Puerto Rico, St. Kitts and Nevis, St. Lucia, St. Vincent, and Trinidad and Tobago. MCII, RCA Globcom, US Sprint, and WU Worldcom will use TCS-1 for services between the US mainland and Puerto Rico. AT&T-PR and WU Worldcom will use TCS-1 for services between Puerto Rico and the Dominican Republic. Some of the foreign owners of TCS-1 will use the system for limited intra-Caribbean traffic.

THE PLEADINGS

7. In its "Contingent Withdrawal of Comments and of Motion for Consolidation of the Puerto Rico Telephone Company", PRTC states that it and AT&T have reached a settlement agreement which resolves numerous outstanding disputes between the two companies. PRTC further states that, as a part of the settlement agreement, it has agreed to withdraw its Comments and Motion for Consolidation, contingent on all terms and conditions of the Settlement Agreement being fulfilled. We shall grant PRTC's contingent request. Consequently, we need not describe or discuss the issues raised in the PRTC pleading being withdrawn, the USISCs opposition to that pleading and PRTC's reply to that opposition.

8. In its comments, CALLS states that it believes TCS-1 provides a serious potential for anti-competitive behavior and labels the ownership arrangment a "cartel which will operate to the detriment not only of other competitors in the Caribbean market, but to the detriment of the public as well." According to CALLS, it was not given the opportunity to purchase an ownership interest in the cable system. CALLS states that once the joint owners have made the massive investment to construct TCS-1, they will have an incentive to ignore alternative transmission facilities which may be more efficient and less costly. CALLS notes that there is already an existing earth station in the Virgin Islands which can carry additional traffic. CALLS further asserts that AT&T apparently has plans to construct an earth station on St.Croix. CALLS labels the need for the TCS-1 cable, and in particular the extension to the Virgin Islands, "highly questionable". CALLS states that the applicants have not made a satisfactory showing for the need of the system.

9. In their opposition and Motion to Strike, the USISCs move to strike CALLS' comments as untimely filed.[14] Substantively, the USISCs assert that CALLS' arguments merely seek to relitigate the facilities plan for the Caribbean Region approved by the Commission in its *Report and Order* in CC Docket No. 83-525.[15] Moreover, the USISCs contend that CALLS' claim is based on a gross misapprehension of significant facts.

10. The USISCs note that the TCS-1 cable will not land in the United States Virgin Islands. Thus, the earth stations in the Virgin Islands are not physically available as alternatives to Segment F of the TCS-1 cable system. In addition, the USISCs assert that the St. Thomas earth station referenced by CALLS is a domestic earth station owned by RCA America Communications, Inc. and that said earth station is not licensed to carry international traffic. According to the USISCs, the AT&T-VI earth station on St. Croix is a customer-premises domestic facility used exclusively in providing private line service to one customer. It is not a part of the switched network available for the completion of international traffic. The USISCs further assert that, even if these earth stations were available, it would make neither economic nor operational sense to complete international traffic from TCS-1's Segment G via earth stations in the United States Virgin Islands. To do so they argue, would eliminate the many advantages of the TCS-1 configuration found to be in the public interest by the Commission such as the introduction of digital optical fiber submarine cable technology in the region, maintenance of media and route diversity and the promotion of intramodal and intermodal competition.

11. With respect to CALLS' assertion that it has not been offered the opportunity to participate in the TCS-1 cable system, the USISCs state that they have no knowledge of any request from CALLS for such participation. They assert that, in any event, the subject application as well as paragraph 29(a) of the TCS-1 C&MA provide a mechanism by which CALLS and other carriers can obtain TCS-1 capacity. The USISCs also note that CALLS must obtain appropriate Section 214 authority before it can become a facilities-based common carrier.

DISCUSSION

A. *Background*

12. The issues concerning the need for and timing of facilities in the Caribbean region for the 1985-1995 period have been considered in the comprehensive planning process in CC Docket No. 83-525. In the *Report and Order*, the Commission reviewed the ability of alternative facilities plans to: satisfy forecasted demand; provide demand flexibility; provide media and route diversity; introduce digital optical fiber technology; and enhance intermodal and intramodal competition. The costs of the alternative plans, the foreign correspondents' acceptance of the plans and national security concerns also were important considerations. The Commission found that TCS-1 cable, configured as proposed in the USISCs' preferred plan would preserve route and media diversity for the Dominican Republic, Jamaica and Haiti and introduce media diversity for service between the United States mainland and Colombia. TCS-1 would minimize blockage that would occur in the event of a failure of the largest facility route to major Caribbean load centers that include Colombia, Barbados, the Dominican Republic, Haiti, Jamaica and Trinidad.

13. The Commission noted further that construction of TCS-1 would allow Puerto Rico to serve as a hub for terrestrial digital services and enhance restoration capabilities. Fiber optic technology would be directly introduced to each of TCS-1's landing points and unforeseen increases in forecasted demands could be accommodated. The Commission found that the provision of TCS-1 by AT&T, a United States supplier, will benefit the national economy and enhance the leading role of this country in worldwide optical fiber cable technology.[16] Therefore, the Commission adopted as a guideline for the construction and use of facilities in the Caribbean region during the 1985-1995 period, its finding that the TCS-1 cable as proposed by the USISCs in their preferred plan, with a ready for service date as early as the fourth quarter of 1989, is in the public interest.

B. ***Allocation of TCS - 1 Capacity***

14. The USISCs indicate that capacity in the TCS-1 cable has been allocated among them on the basis of each USISCs' bilateral negotiations with its correspondents. The capacity assignments arrived at considered capacity requirements to the year 2000 and contemplate the future use of DCMS equipment. The USISCs further state, that with two exceptions,[17] all of the USISCs have existing Section 214 authority for the provision of service to the points which they propose to serve by means of the TCS-1 cable system.

15. The specific allocations of MAUOs in each segment of the TCS-1 cable system are set forth in Schedule D of the C&MA which is attached as Appendix 3. As may be noted from Appendix 3, most of the MAUOs assigned to each of the USISCs are jointly owned by the USISC and one of its correspondents. However, some of the USISCs propose to acquire the whole interest in some MAUOs in the various segments of the TCS-1 cable system. MCII, RCA Globcom, U.S. Sprint and WU Worldcom propose to acquire whole interests in a total of 1,170 MAUOs in the Florida-Puerto Rico portion of TCS-1 cable system (Segment F) for the provision of service between the United States mainland and Puerto Rico and the United States Virgin Islands.[18]

16. AT&T proposes to acquire the whole interest in 290 MAUOs in the Florida-Puerto Rico, 354 MAUOs in the Puerto Rico-Dominican Republic and 256 MAUOs in the Dominican Republic-Jamaica segments of the TCS-1 cable system for the provision of international services. The USISCs indicate that AT&T's assignment of whole interest in a number of MAUOs reflects its negotiations with the administrations in the Netherlands Antilles, the French Antilles and Panama. AT&T indicates that it proposes to retire the United States-Jamaica analog cable system upon the activiation of the TCS-1 cable system. Thereafter, it proposes to use the TCS-1 cable system to extend to the United States mainland, the 144 circuits provided by the Jamaica-Panama analog cable system. AT&T indicates it will file for the appropriate authority after arrangments with its correspondent have been finalized.

C. ***Costs***

17. The capital, maintenance and operating costs for the TCS-1 cable system will be allocated on a *pro rata* basis according to the subject application and the attached C&MA. The USISCs do not provide specific amounts indicating the total USISCs' share of the133.5 million capital cost of the TCS-1 cable system or the individual share of each of the USISC'. However, Schedule B of the C&MA, which forms Appendix 1 of this decision, sets forth each TCS-1 owner's voting perentage. As described in Appendix 1, the voting percentages indicated are derived from each owners' ownership interest in Segments F and G of the TCS-1 cable system weighted by the estimated costs of each segment. Voting percentages thus seem to equate to ownership percentages. Therefore, it would appear that multiplying the total projected capital cost of the TCS-1 cable system by each USISCs' voting or ownership percentage will provide a reasonable approximation of the USISCs' share of the capital costs of the cable.[19] Applying this procedure yeilds the following results:

USISC	OWNERSHIP PERCENTAGE	USISC TCS-1 CAPITAL COST
AT&T	47.99469	64.073 Million
AT&T-PR	0.95296	1.272 Million
MCII	1.70235	2.273 Million
RCA Globcom	0.84106	1.123 Million
U.S. Sprint	6.36340	8.495 Million
WU Worldcom	2.18978	2.923 Million
TOTAL USISCS SHARE	60.0442	80.159 Million

D. ***Extension Facilities***

18. The USISCs state that the TCS-1 cable will be extended to Caribbean points east of Puerto Rico and from the Dominican Republic west to Haiti. Those USISCs having circuit requirements to Haiti will acquire one-half interests in circuits in a digital microwave radio system extending from the TCS-1 terminal in the Dominican Republic to the Dominican Republic-Haiti border. Their Haitian correspondent will acquire the remaining one-half interests in such circuits. These circuits will be acquired on a right of passage or leased basis from a telecommunications entity in the Dominican Republic. The USISCs state that an appropriate application requesting authority for the acquisition of these connecting circuits will be filed when the acquisition terms for the right of passage have been more fully defined.

19. TCS-1 circuits extended to points in the Eastern Caribbean will be extended by means of circuits in a digital microwave radio system extending from the Puerto Rico terminal of the TCS-1 cable system to the United States Virgin Islands. These circuits will be acquired from AT&T-PR and AT&T-VI, on an IRU basis, at a net book cost of approximately637 per one-half interest in each 64 kb/s circuit. These circuits will be extended from the United States Virgin Islands to Tortola by means of a digital microwave radio system between those islands. One-half interests in 64 kb/s circuits in that digital microwave radio system will be acquired from AT&T-VI on an IRU basis at a net book cost of approximately 230. From Tortola, these circuits will be extended by means of circuits in the new digital ECMS system to points as far south as Trinidad. Capacity in the ECMS will be acquired from C&W on an IRU basis at a cost based on the original book costs on the ECMS activation date.

20. Attachment D to the subject application sets forth the connecting circuits requested by AT&T and the costs for such circuits. Attachment D is appended to this decision as Appendix 4. The connecting circuits requested by AT&T include those required to provide its services to Barbados, British Virgin Islands, Dominica, the French

Antilles, Grenada, Montserrat, the Netherlands Antilles, St. Kitts and Nevis, St. Lucia, St. Vincent and Trinidad and Tobago.

21. In addition to AT&T's request to acquire the connecting facilities set forth in Appendix 4, the USISCs request authority to acquire appropriate overseas connecting facilities on a lease basis. The USISCs, other than AT&T, also request such authority as may be necessary to acquire the appropriate connecting facilities between the TCS-1 cable terminals in Florida and Puerto Rico and their respective operating offices in the United States mainland and Puerto Rico. We shall grant all of the above requests.

E. ***Availability of Capacity to New United States Carriers***

22. The USISCs state that paragraph 29(a) of the C&MA provides for the admission, as owners, of other United States certificated carriers which identify a need for TCS-1 capacity prior to the provisional acceptance date[20] for that cable. The USISCs further state that, after the provisional acceptance date for TCS-1, the capacity requirements of other such carriers may be satisfied by IRU, leased MAUOs or other mutually agreed upon arrangments, subject to Commission authorization.

23. Specifically, paragraph 29(a) of the C&MA states:

> 29. (a) If, subsequent to the initialing of this Agreement and prior to the Provisional Acceptance date, a United States carrier certified by the Federal Communications Commission desires to obtain capacity and to participate as an owner in the TCS-1 Cable System, the following arrangements shall apply:
>
> (1) AT&T will allocate such additional number of MAUOs in Segment F to the requesting carrier as is mutually agreed between AT&T and such carrier. Such additional MAUOs will be added to the aggregate number of MAUOs specified in Subparagraph 1 (d)(i) as comprising Segment F.
>
> (ii) MAUOs in any of the subsegments of Segment G will be allocated to such requesting carrier by such of those parties assigned capacity in the appropriate subsegments electing to allocate capacity to the requesting carrier. If more than one party shall be willing to allocate capacity, the requesting carrier and the party to this Agreement which is to be the correspondent of the requesting carrier shall designate which party's capacity shall be allocated.

The foregoing provision makes it clear that the C&MA does provide a mechanism by which new carriers can obtain TCS-1 circuits on an ownership basis up to March 31, 1990, the date of the provisional acceptance of the TCS-1 cable.[21] We also note that paragraphs 11(j) and (k) of the C&MA provide for making circuits available to non-owning carriers on an IRU basis.

24. The Commission has for some time made specific provision for new United States international carriers to have access to circuits in submarine cable systems.[22] We shall continue to follow this precedent. Specifically, we shall adopt the approach taken by the Commission in its TAT-8 authorization[23] and shall authorize the construction and operation of the TCS-1 cable system on condition that the applicants make IRU interests available to carriers who receive authority from the Commission pursuant to Section 214 to acquire such capacity. The making of ownership interests available to such carriers as described in paragraph 29(a) of the C&MA would also satisfy this condition. We will also reserve the right to reallocate capacity in the TCS-1 cable to the extent necessary to enforce our future policies regarding the accommodation of additional carriers. We would note that these conditions apply to the portion of the Florico-2 cable which is not ceded to the TCS-1 cable as well.[24]

F. ***CALLS Comments***

25. We find no merit in the comments filed by CALLS which raise the potential for TCS-1 being used for anticompetitive ends. CALLS' fear is based only on the unsupported assertion that once the massive investment is made in TCS-1, the joint-owners will have an incentive to ignore alternative transmission facilities which may be more efficient and less costly. We disagree. First, the application for construction of TCS-1 was filed as a result of a comprehensive planning process which considered, *inter alia*, the need for TCS-1 and alternative facilities that would be available during the planning period. Moreover, as stated in the *Report and Order*, the needs of carriers to maintain and increase media and path diversity to ensure of service reliability argue against total reliance on a particular facility or transmission medium. We have also reviewed the C&MA, which specifically provides for making capacity available to new entrants. As in past authorizations of cable facilities, the Commission retains jurisdiction to allocate circuits among carriers if no satisfactory agreement can be reached. In light of these cirucumstances, we find no reason to reconsider the conclusion reached in the *Report and Order* concerning the need for TCS-1.

CONCLUSIONS

26. After consideration of the instant application to construct and operate the TCS-1 cable system, we find that the proposal is fully consistent with the Commission's policy objectives expressed in the *Report and Order* in CC Docket No. 83-525 and the ultimate conclusion that the introduction of submarine cable systems in the Caribbean as early as the first quarter of 1989 is in the public interest. The system will also introduce digital technology in the Caribbean, permitting interconnection with a rapidly-developing global digital network, and promote technological development and customer choice.

27. The introduction of this new technology in the Caribbean will sharpen intermodal and intramodal competition by supplemental existing cable and satellite communications. This will increase more incentives for more efficient operations by all facilities supplies in the Caribbean. It will also provide service quality benefits in terms of path diversity, media diversity, and restoration capacity. The proposed system also meets international comity concerns, the needs of national security, and benefit the U.S. economy as a whole and will preserve the leading role of U.S. industry in optical fiber cable system technology. Upon consideration of the foregoing, we find that the present and future public convenience and necessity require the construction and operation of the TCS-1 cable system as described herein.

ORDERING CLAUSES

28. IT IS CERTIFIED, the public convenience and necessity require the provision of IMTS service by U.S. Sprint to Colombia and the provision of IMTS service by MCII to Barbados.

29. Accordingly, IT IS ORDERED, that application File No. I-T-C-88-071 of the USISCs IS GRANTED and the USISCs are authorized to:

(a) construct and operate the TCS-1 cable system described herein;

(b) acquire, on an ownership basis, the interests indicated in the numbers of MAUOs specified in Appendix 3;

(c) acquire appropriate overseas connecting facilities on a lease basis; and

(d) utilize digital circuit multiplication systems equipment to derive additional voice paths from the circuits (MAUOs) authorized herein accordance with the appropriate Commission authorizations.

30. IT IS FURTHER ORDERED that AT&T is authorized to acquire, on an IRU basis, the connecting facilities set forth in Appendix 4.

31. IT IS FURTHER ORDERED that AT&T is authorized to make available to its correspondent in the Netherlands Antilles and the French Antilles, on an IRU basis, one-half interest in 30 and 90 MAUOs, respectively, in the Florida-Puerto Rico segment of the TCS-1 cable system.

32. IT IS FURTHER ORDERED that MCII, RCA Globcom, U.S. Sprint and WU Worldcom are authorized to acquire the appropriate connecting facilities between the TCS-1 cable terminals in Florida and Puerto Rico and their respective operating offices in the United States mainland and Puerto Rico.

33. IT IS FURTHER ORDERED that when a given applicant seeks to acquire or transfer an ownership or IRU interest in TCS-1 capacity, the reimbursement it receives shall be on the basis of depreciated original cost (or the pro rated accumulated cost of such circuit if the systems are not then operational) or in conformance with such policy as the Commission may develop in the future regarding the price at which IRUs will be made available.

34. IT IS FURTHER ORDERED that the Applicants shall make available interests in the TCS-1 capacity to such present and future U.S. carriers as may be authorized by the Commission to acquire such capacity.

35. IT IS FURTHER ORDERED that the Applicants shall make capacity in the TCS-1 system available to non-carriers in conformance with the policies developed in CC Docket No. 83-1230. *See* International Communication Policies, 104 FCC 2d 208 (1986).

36. IT IS FURTHER ORDERED that the Commission retains jurisdiction to reallocate U.S. carriers' interests in capacity herein authorized, as the public interest may require to accommodate additonal carriers or otherwise, with, where required, the concurrence of the foreign administration or carriers concerned, and, further, jurisdiction is retained by the Commission over all matters relating to the applicants' ownership, management, maintenance, and operation of the cable system as authorized herein, to assure the most efficient use not only of this cable system, but of all means of communications between the U.S. and the Caribbean Region.

37. IT IS FURTHER ORDERED that the Commission retains jurisdiction to review the DCMS, multiplexing, and interworking arrangements and attribution of the costs thereof and to require such changes in the provision of these services and equipment as may be necessary.

38. IT IS FURTHER ORDERED that no Applicant, which is deemed a dominant carrier pursuant to the Commission's decision in CC Docket No. 85-107, herein shall dispose of any interest in any TCS-1 capacity it is authorized to acquire in any way without prior authorization by the Commission.

39. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to the Applicants herein under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. Sections 34-39), covering the subject submarine cable, and shall become effective upon the acceptance of the aforementioned license by all such parties.

40. IT IS FURTHER ORDERED that PRTC's contingent request to withdraw its "Comments and Motion for Consolidation of the Puerto Rico Telephone Company" IS GRANTED and said pleading is hereby dismissed.

41. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] The applicants are American Telephone and Telegraph Company (AT&T), AT&T of Puerto Rico, Inc. (AT&T-PR), MCI International, Inc. (MCII), RCA Global Communications, Inc. (RCA Globcom), US Sprint Communications Company (US Sprint), and WU World Communications, Inc. (WU Worldcom).

[2] Also *see* Section 930.54(b) of the Rules of the National Oceanic and Atmospheric Administration (NOAA), 15 C.F.R. Section 930.54(b).

[3] PRTC filed corrections to its pleading on March 21, 1988.

[4] The C&MA defines a MAUO in all segments of the TCS-1 cable, other than the Dominican Republic-Jamaica leg, as consisting of 64,000 usable bits per second (b/s) and an additional 9,684.656 b/s required for multiplexing each of the 1890 such MAUOs in each segment. For purposes of ownership allocation in the Dominican Republic-Jamaica segment, a MAUO is defined as consisting of 64,000 usable b/s and an additional 7,009.524 b/s required for multiplexing each of the 630 MAUOs in such segment.

[5] The Florico-2 cable is a proposed digital, optical fiber cable between Florida and Puerto Rico which will provide two traffic bearing fiber pairs, each operating at 280 mb/s. The Florico-2 cable will provide a total of 7560 MAUOs of which 2880 are proposed to be ceded to the TCS-1 cable system. *See* paragraph 1(d)(i) of the C&MA. The Florico-2 cable was initially proposed by AT&T for only domestic use between the United States main-

land and Puerto Rico. *See* Application File No. W-P-C-5944 filed on February 18, 1987. However, the application was subsequently amended to provide for the mixed domestic/international use now proposed. *See* Amendment to Application File No. W-P-C-5944 filed on March 29, 1988. As now proposed, the 2880 MAUOs ceded to the TCS-1 cable system will be used by the USISCs for international services between the United States mainland and other countries and by the USISCs, other than AT&T, for services between the United States mainland and Puerto Rico and the United States Virgin Islands. AT&T will use the remainder of the 7560 MAUOs for its United States mainland-Puerto Rico and United States-Virgin Islands services except to the extent that additional MAUOs may be ceded to the TCS-1 system pursuant to paragraph 29(a) of the C&MA.

[6] The Dominican Republic-Jamaica portion of TCS-1 was originally proposed to provide a single traffic bearing fiber pair designed to operate at 45 mb/s. However, the joint application indicates that it has recently been determined that a 45 mb/s cable will not be available until approximately nine months after the proposed March 31, 1990 ready for service date for the TCS-1 system. Therefore, the supplier of the cable, AT&T, has agreed to substitute a 140 mb/s design capacity cable equipped to operate at 45 mb/s at no increase in cost.

[7] The C&MA designated the various subsections of the TCS-1 cable systems as follows and indicates the following ownership thereof:

CABLE SEGMENT	DESIGNATION	OWNERSHIP
West Palm Beach, Florida Cable Terminal	Segment A	AT&T
San Juan, Puerto Rico Cable Terminal	Segment B	AT&T-PR
Santo Domingo, Dominican Republic Cable Terminal	Segment C	Compania Dominicana de Telefonos, C por A (CODETEL)
Kingston, Jamaica Cable Terminal	Segment D	International Telecommunications, Limited (JAMINTEL)
Barranquilla, Colombia Cable Terminal	Segment E	Empresa Nacional de Telecommunications (TELECOM)
That portion of the Florico-2 Cable System consisting of 2880 MAOUs ceded to the TCS-1 cable system	Segment F	Jointly by the TCS-1 owners as set forth in Schedule D of the C&MA.
The whole of the submarine cable between and among the cable stations at Puerto Rico, Dominican Republic, Jamaica and Colombia	Segment G	Same as Segment F.
That portion of Segment G between Puerto Rico and the Branching Repeater, including the Branching Repeater	Subseg. G-1	Same as Segment F.
That port of Segment G between the Branching Repeater and the Dominican Republic	Subseg. G-2	Same as Segment F.
That portion of Segment G between the Dominican Republic and Jamaica	Subseg. G-3	Same as Segment F.
That portion of Segment G between the Branching Repeater and Colombia	Subseg. G-4	Same as Segment F.

[8] The number of equivalent voice paths shown assumes that all MAUOs in each segment of the cable are used for the provision of voice services. Since this will not be the case, the number of equivalent voice paths shown should be considered as an upper limit.

[9] According to the USISCs, these costs do not include the cost for DCMS equipment. We also note that the application does not indicate that interest during construction is included in these costs.

[10] The 30.5 million shown for Segment F is only the capital cost associated with the 2880 MAUOs in the Florico-2 cable which have been ceded to the TCS-1 cable system. These 2880 MAUOs comprise 38.0 percent of the 7560 MAUO design capacity of Florico-2. The 30.5 million cost for these 2880 MAUOs was derived by multiplying the estimated 80.5 million cost of the Florico-2 cable by 38.5 percent. *See* C&MA, paragraph 1(d) and Annex 2 to the C&MA, Section 3 Annex.

[11] According to the USISCs, Administration costs include insurance, project management, customs and duties, landing point support and miscellaneous costs.

[12] In addition to the USISCs, several telecommunications entities of other countries will participate in the TCS-1 cable on an ownership basis. These entities are: Barbados External Telecommunications Limited (BET); Cable and Wireless Public Limited Company (C&W); CODETEL; TELECOM; JAMINTEL; Telecommunications D'Haiti, S.A.M. Titre III (Teleco d'Haiti); and Trinidad and Tobago External Telecommunications Company Limited (TEXTEL). AT&T's wholly-owned subsidiary, Transocean Communications, Inc., will hold AT&T's interests in the cable terminals in the Dominican Republic, Jamaica and Colombia as well as in segments of the TCS-1 cable lying in the territorial waters of these countries.

[13] WU Worldcom's request for the whole interest in ten MAUOs for this purpose is not reflected in the C&MA attached to the application but will be included in an amended C&MA.

[14] We deny the USISCs' motion to strike and have considered CALLS comments herein.

[15] Caribbean Region Telecommunications Needs, 1985-1995, 3 FCC Rcd 97 (1988).

[16] In the application before us the USISCs state that AT&T will be the supplier of the TCS-1 cable system and that over 93 percent of TCS-1's cost will be paid to United States industry.

[17] U.S. Sprint does not currently have Section 214 authority for the provision of IMTS to Colombia. MCII does not have Section 214 authority for the provision of IMTS to Barbados. We shall grant the necessary authority for both of these USISCs in this decision.

[18] Each of these USISCs propose to acquire the whole interest in the following number of MAUOs in Segment F for the provision of United States Mainland-Puerto Rico and United States-Virgin Islands services:

PUSISC	NUMBER OF MAUOS
MCII	180
RCA Globcom	90
U.S. Sprint	630
WU Worldcom	270
TOTAL	1,170

[19] Any error in this approximation of costs would not be of sufficient magnitude to alter our findings herein.

[20] Paragraph 2.2 of Section of Annex 2 to the C&MA defines the date of provisional acceptance as the date on which specified tests indicate that Segments F and G of the TCS-1 cable system conform to the TCS-1 Technical Annex. Paragraph 4(b) of the C&MA projects the date of provisional acceptance to be March 31, 1990.

[21] United States carriers seeking to acquire TCS-1 circuits on an ownership basis are required to file both a Section 214 application seeking authority to acquire such circuits and an application for modification of the Submarine Cable Landing License for that cable seeking to add the requesting carrier as a licensee. *See* American Telephone and Telegraph Company, 37 FCC 1131, 1157 (1964) and ITT Cables and Radio, Inc.--Puerto Rico, 5 FCC 2d 823, 832-833 (1966). Non-dominant international carriers as well as dominant interantional carriers continue to be required to follow this procedure. *See* International Carrier Policies, 102 FCC 2d 812, 845 (1985).

[22] *See* AT&T Co., 73 FCC 2d 248, 260 (1979) and AT&T Co., 98 FCC 2d 440, 452-456 (1984).

[23] 98 FCC 2d at p. 455.

[24] *See* Order and Authorization, File No. W-P-C-5944 also adopted this date.

APPENDIX 1

SCHEDULE B

VOTING INTERESTS IN THE TCS-1 CABLE SYSTEM

PARTIES	VOTING INTEREST PERCENTAGE
BET	0.13788
C&W	0.59820
CODETEL	4.67277
JAMINTEL	7.98058
TELECO D'HAITI	1.13052
TELECOM	25.10645
TEXTEL	0.32938
AT&T	47.99469
AT&T-PR	0.95296
ITT WORLDCOM	2.18978
MCII	1.70235
RCA GLOBCOM	0.84106
US SPRINT	6.36340
TOTAL	100.00000

Notes to Schedule B

Note 1 The voting interest percentages set forth in Schedule B are derived from the Segment F and Subsegments G1, G2, G3 and G4 ownership interest percentages set forth in Schedule C weighted by the estimated costs of each such segment and subsegment and expressed as a percentage of the estimated total costs.

Note 2 The voting interest percentages set forth in Schedule B will be adjusted in accordance with the procedures to be determined by the B&B Subcommittee.

APPENDIX 2

SCHEDULE C

PERCENTAGE ALLOCATION OF CAPITAL, OPERATING AND MAINTENANCE COSTS OF SEGMENTS A, B, C, D and E OF THE TCS-1 CABLE SYSTEM AND PERCENTAGE OF OWNERSHIP INTERESTS IN AND ALLOCATION OF CAPITAL, OPERATING AND MAINTENANCE COSTS OF SEGMENT F AND SUBSEGMENTS G1, G2, G3 AND G4

PARTIES	SEGMENT A SUBSEGMENT B1 SUBSEGMENT F NOTE 1	SUBSEGMENT B2 SUBSEGMENT G1	SUBSEGMENT C1 SUBSEGMENT G2 NOTE 2	SUBSEGMENT C2 SEGMENT D SUBSEGMENT G3	SEGMENT E SUBSEGMENT G4
BET	0.59028	0.00000	0.00000	0.00000	0.00000
C&W	2.17014	0.07937	0.15873	0.39683	0.00000
CODETEL	4.82639	11.42857	22.30159	0.47619	0.55556
JAMINTEL	4.02778	6.66667	13.33333	29.68254	0.00000
TELECO D'HAITI	1.57986	2.50000	5.00000	0.23810	0.00000
TELECOM	10.93750	25.19841	0.39683	0.00000	50.00000
TEXTEL	0.52083	0.19841	0.39683	0.87302	0.00000
AT&T	33.54167	49.02116	50.95238	67.46032	47.08995
AT&T-PR	0.00000	3.30688	6.61376	0.00000	0.00000
ITT WORLDCOM	9.37500	0.00000	0.00000	0.00000	0.00000
MCII	6.49306	0.26455	0.52910	0.63492	0.00000
MCA GLOBCOM	3.22917	0.15873	0.31746	0.23810	0.00000
US SPRINT	22.70833	1.17725	0.00000	0.00000	2.35450
TOTAL	100.00000	100.00000	100.00000	100.00000	100.00000

APPENDIX 3

SCHEDULE D
PAGE 1 OF 6

MINIMUM ASSIGNABLE
UNITS OF OWNERSHIP (MAUDS) IN
THE TSC-1 CABLE SYSTEM - SEGMENT F

U.S. MAINLAND - PUERTO RICO
HALF INTERESTS IN MAUDS

SUBSCHEDULE D1
FOR SERVICES BETWEEN POINTS IN, OR ROUTED VIA U.S. MAINLAND
AND POINTS ROUTED VIA PUERTO RICO

PARTIES	BET	C&W	CODETEL	JAMINTEL	TELECO D'HAITI	TELECOM	TEXTEL	AT&T	AT&T-PR	ITT WORLDCOM	MCII	RCA GLOBCOM	US SPRINT	TOTAL
BET	0	0	0	0	0	0	0	24	0	0	4	0	6	34
C&W	0	0	0	0	0	0	0	113	0	0	0	0	12	125
CODETEL	0	0	0	0	0	0	0	270	0	0	5	3	0	278
JAMINTEL	0	0	0	0	0	0	0	225	0	0	5	2	0	232
TELECO D'HAITI	0	0	0	0	0	0	0	90	0	0	0	1	0	91
TELECOM	0	0	0	0	0	0	0	600	0	0	0	0	30	660
TEXTEL	0	0	0	0	0	0	0	30	0	0	0	0	0	30
AT&T	24	113	270	225	90	600	30	580	0	0	0	0	0	1932
AT&T-PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0
ITT WORLDCOM	0	0	0	0	0	0	0	0	0	0	0	0	0	0
MCII	4	0	5	5	0	0	0	0	0	0	0	0	0	14
RCA GLOBCOM	0	0	3	2	1	0	0	0	0	0	0	0	0	6
US SPRINT	6	12	0	0	0	30	0	0	0	0	0	0	0	48
D1 TOTAL	34	125	278	232	91	630	30	1932	0	0	14	6	48	3420

SUBSCHEDULE D2
FOR SERVICES SOLELY BETWEEN US MAINLAND AND PUERTO RICO

PARTIES	ITT WORLDCOM	MCII	RCA GLOBCOM	US SPRINT	TOTAL
ITT WORLDCOM	540	0	0	0	540
MCII	0	360	0	0	360
RCA GLOBCOM	0	0	180	0	180
US SPRINT	0	0	0	1260	1260
D2 TOTAL	540	360	180	1260	2340

TOTAL HALF INTERESTS IN MAUDs in SEGMENT F: 5760

APPENDIX 3

SCHEDULE D
PAGE 2 OF 6

MINIMUM ASSIGNABLE
UNITS OF OWNERSHIP (MAUDS) IN
THE TSC-1 CABLE SYSTEM - SUBSEGMENT G1

PUERTO RICO - DOMINICAN REPUBLIC LIGHTGUIDE PAIR
HALF INTERESTS IN MAUDS

PARTIES	BET	C&W	CODETEL	JAMINTEL	TELECO D'HAITI	TELECOM	TEXTEL	AT&T	AT&T-PR	ITT WORLDCOM	MCII	RCA GLOBCOM	US SPRINT	TOTAL
BET	0	0	0	0	0	0	0	0	0	0	0	0	0	0
C&W	0	0	0	6	0	0	0	0	0	0	0	0	0	6
CODETEL	0	0	0	0	0	15	0	562	250	0	10	6	0	843
JAMINTEL	0	6	0	0	0	0	15	469	0	0	10	4	0	504
TELECO D'HAITI	1	0	0	0	0	0	0	187	0	0	0	2	0	189
TELECOM	0	0	15	0	0	0	0	0	0	0	0	0	0	15
TEXTEL	0	0	0	15	0	0	0	0	0	0	0	0	0	15
AT&T	0	0	562	469	187	0	0	708	0	0	0	0	0	1926
AT&T-PR	0	0	250	0	0	0	0	0	0	0	0	0	0	250
ITT WORLDCOM	0	0	0	0	0	0	0	0	0	0	0	0	0	0
MCII	0	0	10	10	0	0	0	0	0	0	0	0	0	20
RCA GLOBCOM	0	0	6	4	2	0	0	0	0	0	0	0	0	12
US SPRINT	0	0	0	0	0	0	0	0	0	0	0	0	0	0
TOTAL	0	6	843	504	189	15	15	1926	250	0	20	12	0	3780

APPENDIX 3

SCHEDULE D
PAGE 3 OF 6

MINIMUM ASSIGNABLE
UNITS OF OWNERSHIP (MAUDS) IN
THE TSC-1 CABLE SYSTEM - SUBSEGMENT G1

PUERTO RICO - COLOMBIA LIGHTGUIDE PAIR
HALF INTERESTS IN MAUDS

CARRIES	BET	C&W	CODETEL	JAMINTEL	TELECO D'HAITI	TELECOM	TEXTEL	AT&T	AT&T-PR	ITT WORLDCOM	MCII	RCA GLOBCOM	US SPRINT	TOTAL
BET	0	0	0	0	0	0	0	0	0	0	0	0	0	0
C&W	0	0	0	0	0	0	0	0	0	0	0	0	0	0
CODETEL	0	0	0	0	0	21	0	0	0	0	0	0	0	21
JAMINTEL	0	0	0	0	0	0	0	0	0	0	0	0	0	0
TELECO D'HAITI	0	0	0	0	0	0	0	0	0	0	0	0	0	0
TELECOM	0	0	21	0	0	0	0	1780	0	0	0	0	89	1890
TEXTEL	0	0	0	0	0	0	0	0	0	0	0	0	0	0
AT&T	0	0	0	0	0	0	0	0	0	0	0	0	0	1780
AT&T-PR	0	0	0	0	0	1780	0	0	0	0	0	0	0	0
ITT WORLDCOM	0	0	0	0	0	0	0	0	0	0	0	0	0	0
MCII	0	0	0	0	0	0	0	0	0	0	0	0	0	0
RCA GLOBCOM	0	0	0	0	0	0	0	0	0	0	0	0	0	0
US SPRINT	0	0	0	0	0	89	0	0	0	0	0	0	0	89
TOTAL	0	0	21	0	0	1890	0	1780	0	0	0	0	89	3780

APPENDIX 3

SCHEDULE D
PAGE 4 OF 6

MINIMUM ASSIGNABLE
UNITS OF OWNERSHIP (MAUOS) IN
THE TSC-1 CABLE SYSTEM - SUBSEGMENT G2

PUERTO RICO - DOMINICAN REPUBLIC LIGHTGUIDE PAIR
HALF INTERESTS IN MAUOS

PARTIES	BET	C&W	CODETEL	JAMINTEL	TELECO D'HAITI	TELECOM	TEXTEL	AT&T	AT&T-PR	ITT WORLDCOM	MCII	RCA GLOBCOM	US SPRINT	TOTAL
BET	0	0	0	0	0	0	0	0	0	0	0	0	0	0
C&W	0	0	0	6	0	0	0	0	0	0	0	0	0	6
CODETEL	0	0	0	0	0	15	0	562	250	0	10	6	0	843
JAMINTEL	0	6	0	0	0	0	15	469	0	0	10	4	0	504
TELECO D'HAITI	0	0	0	0	0	0	0	187	0	0	0	2	0	189
TELECOM	0	0	15	0	0	0	0	0	0	0	0	0	0	15
TEXTEL	0	0	0	15	0	0	0	0	0	0	0	0	0	15
AT&T	0	0	562	469	187	0	0	708	0	0	0	0	0	1926
AT&T-PR	0	0	250	0	0	0	0	0	0	0	0	0	0	250
ITT WORLDCOM	0	0	0	0	0	0	0	0	0	0	0	0	0	0
MCII	0	0	10	10	0	0	0	0	0	0	0	0	0	20
RCA GLOBCOM	0	0	6	4	2	0	0	0	0	0	0	0	0	12
US SPRINT	0	0	0	0	0	0	0	0	0	0	0	0	0	0
TOTAL	0	6	843	504	189	15	15	1926	250	0	20	12	0	3780

APPENDIX 3

SCHEDULE O
PAGE 5 OF 6

MINIMUM ASSIGNABLE
UNITS OF OWNERSHIP (MAUOS) IN
THE TSC-1 CABLE SYSTEM - SUBSEGMENT G3

DOMINICAN REPUBLIC - JAMAICA LIGHTGUIDE PAIR
HALF INTERESTS IN MAUOS

PARTIES	BET	C&W	CODETEL	JAMINTEL	TELECO D'HAITI	TELECOM	TEXTEL	AT&T	AT&T-PR	ITT WORLDCOM	MCII	RCA GLOBCOM	US SPRINT	TOTAL
BET	0	0	0	0	0	0	0	0	0	0	0	0	0	0
C&W	0	0	0	5	0	0	0	0	0	0	0	0	0	5
CODETEL	0	0	0	6	0	0	0	0	0	0	0	0	0	6
JAMINTEL	0	5	6	0	3	0	11	338	0	0	8	3	0	374
TELECO D'HAITI	0	0	0	3	0	0	0	0	0	0	0	0	0	3
TELECOM	0	0	0	0	0	0	0	0	0	0	0	0	0	0
TEXTEL	0	0	0	11	0	0	0	0	0	0	0	0	0	11
AT&T	0	0	0	338	0	0	0	512	0	0	0	0	0	850
AT&T-PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0
ITT WORLDCOM	0	0	0	0	0	0	0	0	0	0	0	0	0	0
MCII	0	0	0	8	0	0	0	0	0	0	0	0	0	8
RCA GLOBCOM	0	0	0	3	0	0	0	0	0	0	0	0	0	3
US SPRINT	0	0	0	0	0	0	0	0	0	0	0	0	0	0
TOTAL	0	5	6	374	3	0	11	850	0	0	8	3	0	1260

APPENDIX 3

SCHEDULE D
PAGE 6 OF 6

MINIMUM ASSIGNABLE
UNITS OF OWNERSHIP (MAUOS) IN
THE TSC-1 CABLE SYSTEM - SUBSEGMENT G4

PUERTO RICO - COLOMBIA LIGHTGUIDE PAIR
HALF INTERESTS IN MAUOS

PARTIES	BET	C&W	CODETEL	JAMINTEL	TELECO D'HAITI	TELECOM	TEXTEL	AT&T	AT&T-PR	ITT WORLDCOM	MCII	RCA GLOBCOM	US SPRINT	TOTAL
BET	0	0	0	0	0	0	0	0	0	0	0	0	0	0
C&W	0	0	0	0	0	0	0	0	0	0	0	0	0	0
CODETEL	0	0	0	0	0	21	0	0	0	0	0	0	0	21
JAMINTEL	0	0	0	0	0	0	0	0	0	0	0	0	0	0
TELECO D'HAITI	0	0	0	0	0	0	0	0	0	0	0	0	0	0
TELECOM	0	0	21	0	0	0	0	1780	0	0	0	0	89	1890
TEXTEL	0	0	0	0	0	0	0	0	0	0	0	0	0	0
AT&T	0	0	0	0	0	1780	0	0	0	0	0	0	0	1780
AT&T-PR	0	0	0	0	0	0	0	0	0	0	0	0	0	0
ITT WORLDCOM	0	0	0	0	0	0	0	0	0	0	0	0	0	0
MCII	0	0	0	0	0	0	0	0	0	0	0	0	0	0
RCA GLOBCOM	0	0	0	0	0	0	0	0	0	0	0	0	0	0
US SPRINT	0	0	0	0	0	89	0	0	0	0	0	0	0	89
TOTAL	0	0	21	0	0	1890	0	1780	0	0	0	0	89	3780

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

CNCA ACQUISITION CORP. *et al.* File Nos. 00506-CL-TC-1-88

For Commission Consent to a Transfer of Control of American Cellular Network Corp.

MEMORANDUM OPINION AND ORDER

Adopted: Feb. 22, 1988; Released: Feb. 22, 1988

By the Commission: Commissioner Quello dissenting.

INTRODUCTION

1. CNCA Acquisition Corp. (CNCA) seeks to acquire control by tender offer of American Cellular Network Corp. (AmCell).[1] Applications for a two step transfer of control were filed on January 15, 1988. Step one seeks approval of a transfer of control from AmCell's current shareholders to former Senator William D. Hathaway, as Trustee of a Voting Trust. If the step one application is approved, Senator Hathaway would control the stock of AmCell tendered by the current shareholders to CNCA, pending approval of the second step application. The step two applications seek approval for CNCA to assume control of AmCell by dissolving the Voting Trust and assuming ownership and control of the purchased shares directly. Special temporary authorization (STA) has been requested for step one to enable the trustee to acquire and vote shares, subject to certain restrictions, obtained in the tender offer and to exercise control of AmCell's licensed facilities during the interim period while CNCA's qualifications are under consideration.

2. We have before us for consideration the request for a STA, an Informal Objection filed on February 4, 1988 by AmCell and the February 5, 1988 Opposition of CNCA.

The Applicant's Proposal

3. CNCA made a tender offer for 4,500,000 shares of the common stock of AmCell, at a price of15.50 per share on January 21, 1988. CNCA is a wholly owned subsidiary of Cellular Communications of Ohio, Inc. (CCO), a Delaware corporation, which is a wholly owned subsidiary of Cellular Communications Inc. (CCI), a publicly traded Delaware corporation. CNCA was created to make the offer and purchase shares of AmCell. The tender offer is being conducted without the cooperation and support of AmCell's management and is therefore considered a "hostile" tender offer.[2]

4. CCI already owns 219,550 shares of AmCell's common stock. If CNCA acquires 4,500,000 shares of AmCell stock, CNCA and CCI will hold approximately 89 percent of AmCell's outstanding 5,325,000 shares of voting common stock. These holdings would exceed 50 percent of the shares of AmCell's voting common stock if all currently issued nonvoting securities which are convertible into voting common stock were converted (approximately 51% of the outstanding shares of the company on a fully diluted basis). Subject to receiving the necessary regulatory approval, CCI (through its control of CNCA) intends to exercise control over the operation and management of AmCell.

5. CNCA has executed a Temporary Voting Trust Agreement (Agreement) with William D. Hathaway, Esquire. Senator Hathaway is a former member of the United States House of Representatives and the United States Senate. He has no direct or indirect familial ties or business relationship with CNCA, CCI or any of their affiliates, directors or officers. He is neither a CCI shareholder nor a holder of any debt of CCI or any of its affiliates. Senator Hathaway is a United States citizen. He has never been convicted of any felonies by any state or federal court.

6. This voting trust provides that all shares acquired by CNCA pursuant to its tender offer, as well as all shares purchased previously by CCI or its affiliates, will be transferred into the Trust immediately upon consummation of the Offer. The Agreement explicitly prohibits CNCA from becoming involved in or seeking to influence, directly or indirectly, AmCell's operations or management. All oral communications between the Trustee and CNCA are prohibited, and only written communications between the Trustee and CNCA relating to the mechanics of the tender offer and reports from the Trustee to CNCA concerning AmCell's operations are permitted. All terms applicable to CNCA are also binding on CCI and its other subsidiaries and affiliates.

7. The Trustee is prohibited from having its representatives hold more than a minority of the membership on AmCell's Board. CNCA believes that AmCell's Board currently has five members; thus, the Trustee would not be permitted to have more than two representatives on AmCell's Board. The Agreement also provides that if the Trustee is able to do so under applicable state and federal corporate and securities laws, the Trustee can replace officers, directors or employees who have resigned or whose actions or proposed actions are inconsistent with effectuation of the Offer, seek to waste corporate assets, diminish the value of AmCell's licensed properties as transferable assets, or otherwise are inconsistent with his obligations. In all other respects, the Trustee is required to vote the stock of the Voting Trust to maintain the *status quo* regarding AmCell's assets, present management and operations. In the event CNCA's application is not approved, the Trustee would dispose of the stock subject to FCC approval.

8. CNCA states that it has established its financial ability to consummate the tender offer. CCI and CCO have committed to cover the tender costs by means of a capital contribution from funds on hand or available under existing credit arrangements. CCI has approximately87 million in cash and cash equivalents on hand. Moreover, CCO has a100 million credit facility under which approximately75 million is available for borrowing. CNCA therefore, maintains that the aggregate of approximately162 million in readily available funds more than exceeds the amounts necessary to cover CCI's own current liabilities, the costs of acquiring the tendered stock, and any operating cash deficits of the combined companies. Accordingly, CNCA

states that it does not require, and does not intend to seek, any additional loans or equity placements to fund its acquisition of AmCell.

Overview of Pleadings

9. AmCell objects to the grant of the step one applications, contending the applications should be dismissed or held in abeyance pending a ruling by the New Jersey Board of Public Utilities. In addition, AmCell asserts that the Agreement fails to comply with Commission requirements, for lack of insulation between the Trustee and CNCA. According to Amcell, the Agreement's provision for the removal of AmCell's officers violates the directors' rights under Section 309 of the Communications Act. Finally, AmCell contends that substantial questions exist concerning the availability to CNCA of the75 million from the credit facility. In response CNCA asserts that AmCell's objections are unsupported by fact or law, amounting to nothing more than an effort by AmCell management to disrupt CNCA's tender offer for the company stock.

New Jersey Public Utilities Law

10. *AmCell's Contention* : AmCell requests that the Commission dismiss the applications as premature pending a ruling by the New Jersey Board of Public Utilities (NJBPU) or, alternatively, hold in abeyance any action on the step one applications until the NJBPU rules on the validity of the Agreement under state law. At a minimum, AmCell claims that principles of dual jurisdiction and comity require that the Commission condition its approval of the step one applications on the state's determination concerning the validity of the Agreement.

11. In its schedule 14D-1 filing with the Securities and Exchange Commission (SEC), CNCA acknowledged that New Jersey may attempt to assert jurisdiction over "certain transfers of stock or changes of control of cellular telephone systems." New Jersey law provides that no person shall acquire or seek to acquire control of a "public utility" through the purchase of shares or otherwise without requesting and receiving the written approval of the NJBPU, and declares any action taken in violation of this provision to be void. [3] On January 25, 1988, CNCA requested from the NJBPU a written "confirmation" that New Jersey public utilities law does not apply to the instant transaction. CNCA further requests that, if the Board decides that written approval is necessary for the acquisition of control of a cellular system, please accept this letter as a request pursuant to N.J.S.A. 48:2-51.1 for written approval.

12. AmCell does not believe that it should be considered a "public utility" for purposes of New Jersey public utility law. While the NJBPU has not yet ruled, that the law is inapplicable to cellular telephone systems, we are told that the NJBPU will consider the matter to determine the scope of the law in the near future. According to AmCell, if the Board concludes that the law applies, the Agreement, which did not have prior approval from the NJBPU, may be void *ab initio*. Thus, AmCell asserts that the Commission cannot ignore New Jersey law regarding the validity of the Agreement.

13. *CNCA's Response:* CNCA alleges that this Commission has long held that the proper means of reaching accommodation of interests regarding common carriers subject to dual federal-state jurisdiction is not to delay federal proceedings until state issues have been resolved, but rather to complete such proceedings subject to the outcome of pending state or other proceedings. In addition, CNCA claims that AmCell's portrayal of the New Jersey statute as a bar to the processing of the pending applications is without merit, since this law applies only to public utilities. Even assuming the law applies, CNCA argues that the Commission can follow its long-held policy of acting expeditiously in tender offer cases.

14. *Discussion:* Under Section 310 of the Communications Act prior Commission consent to the transfer of control of licensed facilities must be obtained. *See* 47 U. S. C. Section 310(d). The two-step process proposed by the applicant has been used recently to acquire control of a company by tender offer, which presents extraordinary circumstances requiring prompt action to further the public interest. In such a proceeding, the first step entails the grant of an STA to a trustee to permit the collection and purchase of the tendered shares and to operate the licensed facilities, subject to specified conditions. If the tender offer is successful, the second step would be consideration of the offeror's qualifications under the formal procedures specified in Section 309(d) of the Communications Act.[4] *Macfadden Acquisition Corp.* (*Macfadden II*), 60 Rad. Reg. 2d (P&F) 339, 341 (1986). To date this process has been used to permit prompt Commission action in response to hostile takeover by tender offer. *Frank K. Mayers* (*Reliance I*), 60 Rad. Reg. 2d (P&F) 1095, 1098 (1986).

15. We have set four broad goals for our treatment of all cases dealing with hostile tender offers: (1) to carry out our statutory mandate fully; (2) to use neutral procedures, favoring neither incumbents nor challengers; (3) to act expeditiously, because delay often favors one party in the contest for control; and (4) to accommodate to the fullest extent possible state and other federal laws and policies concerning the governing of corporations. *Policy Statement, supra*, at 1539-40. We seek to accommodate other federal policies in making our own public interest determinations because "the Commission has a duty to implement the Communications Act, but also must do so in a manner as consistent as possible with corporate and federal security laws protection of shareholders' rights." *Storer Communications Inc. v. FCC*, 763 F.2d 436, 443 (D.C. Cir. 1985). Other relevant federal policies having an effect on these types of takeovers are found in the Williams Act and in the Hart-Scott-Rodino Antitrust Improvements Act. These laws generally seek to protect shareholders and to provide for prompt action on the part of governmental reviewing bodies. They also serve to encourage informed choices by shareholders and to provide opportunities for them to benefit from competitive bidding for the stock of the company. Moreover, an efficient mechanism for permitting hostile tender offers is beneficial "because they serve a useful purpose in providing a check on entrenched but inefficient management." *See generally, Policy Statement, supra*, at 1554-57. Other agencies have adopted similar trust mechanisms under provisions similar to Section 310(d) of the Act. *Macfadden Acquisition Corp.* (*Macfadden I*), 104 FCC 2d 545, 559-60 (1986).

16. In order to effectuate this objective the Commission has established special procedures designed to guarantee prompt action by the Commission while at the same time accommodating diverse regulatory structures. The two-step procedure is an expedited process and, we believe, is neutral as between the contestants. The Commission's ac-

tion on the STA request in the instant case does not preempt state action. Moreover, we believe that grant of an STA in cases such as the one before us benefit the public interest. As we stated in the *Policy Statement, supra* at 1584:

> [W]e find that the exclusive use of the long form procedures would result in protracted delays, effectively insulate incumbent management from takeover challenges, and conflict with the objective of governmental neutrality set forth in the Williams Act and our policies. Indeed, the regulatory delays arising from this procedure in effect deprive shareholders of communications corporations of the ability to consider tender offers. For these reasons, we believe that extraordinary circumstances exist which fully justify the application of the exceptional procedures prescribed by Section 309(f) of the Communications Act.

See also, Frank K. Mayers, 60 Rad. Reg. 2d 1288, 1292 n. 11 (1986)(provisions of the Hart-Scott-Rodino law were considered in adopting general provisions of the Commission's tender offer policy, but do not require application by the Commission in the specific case where, as here, other agencies also oversee the subject transaction); *L. P. Media, Inc*, 102 FCC 2d 1276, 1278 (1985)(existence of state statute delaying consummation of tender offer and pendency of litigation challenging state statute insufficient to warrant delay of action on STA).

17. The propriety of the use of this procedure is not challenged in the instant case, although CNCA's compliance with the procedure is at issue, as discussed below. This procedure has been followed in *Macfadden II, supra; L. P. Media Inc.*, 102 FCC 2d 1276 (1985); and *One Two Corp.*, 58 Rad. Reg. 2d (P&F) 924 (1985). It was also a primary subject of Policy Statement in MM Docket No. 85-218, *Tender Offers and Proxy Contests (Policy Statement)*, 59 Rad. Reg. 2d (P&F) 1536 (1986), *appeal dismissed sub nom., Office of Communication of the United Church of Christ v. FCC*, 826 F.2d 101 (D.C. Cir. 1987). These decisions will govern the consideration of the instant proposed transaction. As we stated in the past: ". . . this Policy Statement is intended to provide a framework for the regulatory treatement of tender offers and proxy contests involving Commission licensees or companies with with controlling interests in Commission licensees." *Policy Statement*, at 1584.

Compliance of CNCA's proposal with the Policy Statement

18. *AmCell's Contentions:* AmCell asserts that the requisite separation between the offeror and the Trustee has not been guaranteed by CNCA. This alleged inadequate separation can be seen from the following facts. AmCell argues that the Agreement impermissibly allows CNCA to intrude upon the Trustee's independence. First, the Trustee has been represented in these proceedings by CNCA's law firm, Mintz, Levin, Ferris, Glovsky & Popeo, P. C. (Mintz) even though the Agreement expressly proscribes such a relationship. Mintz transmitted to the Commission the step-two applications of its client and the step-one applications of the Trustee. Mintz paid the FCC's filing fees on behalf of the Trustee. A meeting called by the FCC staff was not attended by the Trustee or his attorney, Jeffrey Smith. An amendment filed on behalf of the Trustee was filed by Mintz. In addition, AmCell maintains that this is the second time in recent years that the Trustee has agreed to serve as a Trustee on behalf of a client of Mintz.[5] According to AmCell, at a minimum the Commission should require the Trustee to fully disclose the nature and extent of all prior relationships with Mintz.

19. Secondly, AmCell argues that there is a problem with the Trustee's use of his own law firm --Patton, Boggs & Blow-- as counsel. Because Patton, Boggs is a large law firm with a national practice, the opportunity exists for a potential conflict to arise between performance of the Trustee's duties as trustee and the interests of another client of the law firm. According to AmCell it appears that in late 1987 Patton, Boggs was a lobbyist for American Broadcasting Company (ABC), which was subsequently merged into Capital Cities/ABC Broadcasting, Inc. Capital Cities/ABC held 7.13% of CCI's outstanding common stock in late 1987. Therefore, AmCell requests that the Trustee be required to disclose the scope of his law firm's involvement with ABC. If the Commission does not find this relationship to be disqualifying it should in any event condition any grant on the Trustee retaining a separate law firm, according to AmCell.

20. *CNCA's response:* CNCA maintains that the fact that its counsel transmitted the Trustee's applications does not raise questions of unauthorized influence or control. Because the offeror and not the Trustee has a direct and immediate interest in assuring the successful prosecution of both sets of applications, counsel for offerors' in some previous cases have performed the various application filing functions for both steps and have defended both applications when they were opposed by target companies. In addition, concerning the payment of the filing fee by CNCA, it states that the Agreement obligates CNCA to reimburse the Trustee for all expenses incurred by him in his capacity as Trustee. Moreover, CNCA's efforts in prosecuting the applications do not jeopardize the goal of Trustee independence and insulation. The Agreement ensures that CNCA will not be able to exercise control directly or indirectly over AmCell's licensed facilities until the Commission approves the step-two applications.

21. Secondly, AmCell's claim, that Patton, Boggs & Blow's representation of Capital Cities/ABC Broadcasting, Inc. disqualifies the firm from serving as Hathaway's counsel because Capital Cities is a shareholder in CNCA's corporate parent, is based on a factual misunderstanding. CNCA submitted a declaration by the Trustee affirming that he has no present relationship whatsoever with Patton, Boggs & Blow; that he is considering whether to renew his "Of Counsel" status with the firm; that the firm no longer represented Capital Cities/ABC at the time he agreed to serve as Trustee in this proceeding; that his only representation of ABC consisted of approximately 25 hours of his services rendered in 1983; and that in addition to the other conditions in the Agreement he agrees to be bound by the condition imposed upon the trustee in *Macfadden II*, 60 Rad. Reg. 2d (P&F) at 883, including the use of a law firm without any interests in AmCell or in CNCA.[6]

22. *Discussion:* Two broad principles underlie our use of the two-step trustee procedure-- maintenance of the *status quo* of the target corporation and insulation of the trustee from the offeror. "We expect a trustee to act, whenever possible, . . . in a manner which preserves the *status quo* and maintains the general character of the corporation." *Policy Statement, supra*, at 1582. *Macfadden I, supra*, at

551. Maintaining the *status quo* requires the trustee to "act so as to maintain the present management and operations" of the target Company. *One Two Corp.*, 58 Rad. Reg. 2d (P&F) 924, 937 (1985). We require strict insulation between the trustee and the offeror to assure that the trustee acts independently of the offeror and that the offeror does not influence or assume control of the licensed facilities before the grant of our approval under long-form procedures. *Policy Statement*, *supra*, at 1578-80; *Macfadden I*, *supra*, at 551. This we believe is essential to carrying out the purposes of section 309 of the Act.

23. In the *Policy Statement*, we stated that:

> [W]e do not believe that it furthers the public interest to completely prohibit all communications between the offeror and the trustee. The offeror, with its significant financial investment, has a legitimate interest in matters involving the corporation, and certain types of communications would not adversely affect our regulatory objectives. In *McCarthy*, we specifically permitted the trustee to send written information to the offeror regarding the management or operations of the company. Because the mere receipt of written reports from the trustee would not provide the offeror with the means by which to influence corporate affairs, we do not find it is necessary to prohibit the trustee from sending such reports to the offeror informing him or her about matters relating to the company. We also do not believe that there is any reason to prohibit communications between the trustee and the offeror relating to the purchase of tendered stock, as the exchange of information on the mechanics of implementing the tender offer would not convey the ability to influence the licensee. During the time in which the STA is in effect, we will proscribe all oral communications between the offeror and the trustee.

Id. at 1581.

24. We recognize that the primary interest in the prosecution of these applications lies with CNCA, and we find that the communications and actions between the Trustee and CNCA in the instant case are allowed and do not violate the Policy Statement. Moreover, the Agreement provides sufficient insulation between the Trustee and CNCA to meet the standards articulated in the Policy Statement. *See* Agreement Sections 5(f) (Tenderor and Trustee shall not communicate with each other except as permitted; permissible communications shall be in writing; permissible communications are those initiated by either Tenderor or Trustee concerning the mechanics of solicitation, tender, and purchase of shares of Target and reports from the Trustee to Tenderor with respect to the management and operations of target); and Section 6 (prior to FCC consent to step two neither Tenderor, nor its officers, shall be involved, directly or indirectly, in the operation or management of target or seek to influence the operation or management of target; no communications shall be made to Trustee by Tenderor, regarding the operation or management of Target). The Agreement also provides for the reimbursement to the Trustee of all charges and expenses. Agreement Section 8(d). Once the STA is in effect, we will proscribe all oral communications between the Trustee and CNCA.[7]

25. Concerning the allegations about the Trustee's law firm, in the past we have stated that our goal is to assure that the Trustee is independent. Such insulation and independence would not be assured if, for example, the Trustee also represented clients who had interests that would gain or lose based on the outcome of a proposed acquisition of a target company. *Macffadden II*, *supra*, at 878. The likelihood of trustee insulation and independence is considerably enhanced when the trustee has no history of personal contact with the client. In *Macfadden II*, *supra*, we imposed the following conditions, based on the RKO case, *RKO General, Inc.*, 58 FCC 2d 435; 59 FCC 2d 641 (1976) in order to guarantee insulation:

> The trustee shall be insulated from other members of his law firm that represent investors in Macfadden in the manner required by RKO General, Inc., specifically including: (a) his existing or future compensation shall not be based in any way on his firm's representation of those investors while he is acting as trustee; (b) he shall be insulated from any involvement in the legal representation of those investors, and will be denied access to the firm's files for those clients, and all other firm members, law clerks or paralegal assistants shall be prohibited from consulting with or otherwise communicating with the trustee as to the firm's representation of the investors or as to his trusteeship of John Blair & Company; (c) he shall not use his own law firm for legal advice in his role as a trustee. Any law firm or firms he selects shall represent no clients with interests in John Blair & Company or the Macfadden interests.

Although the Trustee's connection with the law firm in question is not currently active, in order to assure insulation, we shall impose similar conditions on the Trustee in the instant case. In addition, Section 8(d) of the Agreement requires the Trustee to hire independent counsel.

Pledge Provisions

26. *AmCell's Contentions:* AmCell also alleges that the pledge provisions in the Agreement violate the Policy Statement and the Act. The right given to the trustee to pledge the AmCell stock which he is to receive and hold, AmCell contends, not only creates the risk of ongoing control of his actions by CNCA and its affiliates, but also substantially undermines the trustee's ability to hold and control the AmCell stock free from outside influence pending the Commision's decision. According to AmCell, once the stock is pledged to support a very substantial debt, the fate of the stock depends, not just on events which are outside the trustee's control, but upon events which are directly within the control of CNCA and its affiliates. Thus, the possibility exists that CNCA may seek directly to influence the trustee's actions through pressure on the lenders. The possibility remains that the lenders themselves may pressure the trustee in order to protect the lender's investment. Amcell requests that if the Commission does not prohibit the trustee from pledging the AmCell stock, then it should at least condition the transfer of that stock to the trustee upon a commitment by the lenders to refrain from interference with the trustee.

27. *CNCA's response:* CNCA maintains that it has more than enough money to cover the costs associated with this transaction. Therefore, no financing arrangement exists

which requires the pledge of AmCell stock, nor will any such agreement be required to finance CNCA's acquisition of AmCell stock. The only conditions to be imposed upon the advance of funds to CNCA are (1) CNCA's execution of a promissory note to its parent, CCO, payable in 15 years at an 8% interest rate, and (2) CCO's pledge of that Note to the banks. No additional collateral will be required. AmCell stock by definition is now and will continue to be excluded from the stock and other interests otherwise required to be pledged as security for this loan. Moreover, CNCA maintains that even though no pledge is necessary, it bears noting that the provision of the trust agreement giving the Trustee authority merely reflects a commercial reality (financing agreements frequently involve a pledge to the lender of the assets to be acquired using the financing). Finally, CNCA maintains that the Commission has approved exactly the same pledge provision that appears in CNCA's Agreement when it approved the trust submitted by Macfadden.

28. *Discussion:* We agree with CNCA that the loan agreement submitted with the applications does not require the pledge of the stock of AmCell. *See* , Sections 1.6.3 Loan Agreement, Schedule 1.6.3, Section 3.12 Loan Agreement and Section 7.5 Stock Pledge Agreement (other stocks and other partnership interests are required to be pledged). In addition, we agree with CNCA that the Macfadden trust agreement accepted by the Commission contained a provision stating that the shares may be pledged as security to a financial institution for a loan to acquire the stock. *Macfadden I. supra*, at 548; *Macfadden II*, 60 Rad. Reg. 2d (P&F) 872 (1986). Thus, we conclude that no action is called for on AmCell's allegations on this point.

Removal of AmCell's Directors for Opposing the Tender Offer Undermines Their Rights under Section 309 of the Communications Act.

29. *AmCell's Contentions:* The directors and management of a target licensee may find it necessary to oppose a tender offer, and the offeror's qualifications to assume control. However, the CNCA Agreement empowers the Trustee, *inter alia*, to remove and replace any officer, director, or employee . . . whose actions are inconsistent with the Trustee's obligations. Agreement para. 5(c). The Agreement obligates the Trustee to oppose any actions of Target, or of Target's Board of Directors, officers or employees, that are inconsistent with or would impede or impair the effectuation of the Tender Offer. The Agreement empowers the Trustee to remove any AmCell director, officer or employee for any actions taken in assisting or directing the filing and prosecution of petitions to the FCC to deny the step two applications and appeals. Thus, AmCell claims that the directors' rights under Section 309 are cut short. AmCell maintains that the trustee mechanism as applied here, which allows for the removal of directors whose actions are inconsitent with the Trustee's obligations, will not result in governmental neutrality, but rather tip the balance to favor CNCA. With the dismissal of AmCell's directors and management any semblance of retaining the " *status quo* " of the company would be lost. Finally, AmCell requests that, to the extent that paragraph 5 of the Agreement is consistent with the discretion provided an interim trustee by the Commission's Policy Statement, the Commission clarify that officers, directors and management personnel of a target company may not be removed or replaced by the trustee solely due to their exercise of Section 309 due process rights; *i.e.*, their continued direction, participation and assistance in the filing, prosecution and appeal of comments or objections to the underlying step-two applications.

30. *CNCA's response:* CNCA alleges that the Commission has approved trustees having such a power in two prior trust agreements and in the Policy Statement. According to CNCA, by demanding the "right" to oppose CNCA's proposed acquisition even after a majority of AmCell's shares have been tendered, AmCell's management is attempting to defy both the will of its shareholders and the Commission's consistent refusal to allow its procedures to favor either side in battles for corporate control. Rather than recognize such a right, the Commission should maintain its policy of neither interfering with nor enhancing AmCell's management's right to seek to defeat the tender offer in the time and in the manner allowed by the Williams Act -- by persuading the shareholders not to tender their shares to CNCA.

31. In addition, CNCA asserts that the premise of AmCell's argument, that the trustee will remove AmCell's management if it chooses to file pleadings opposing CNCA'a acquisition, has not been established. No provision of the Agreement explicitly requires this result. Rather the trustee is authorized to replace officers or directors who act in a manner "inconsistent with the Trustee's obligations" under the Agreement. It is for the Trustee to decide, in the exercise of his independent judgement, whether any particular actions meet this standard. Moreover, AmCell seeks to twist the obligation imposed by Congress on the Commission (the Commission has an obligation to make the statutorily required public interest finding prior to permitting the tenderor to assume direct control of target) into a right on the part of AmCell's management to oppose the offer and the offeror in all available legal fora, including the Commission. CNCA maintains that AmCell's argument is a belated challenge to procedures already sanctioned and established by the Commission. CNCA maintains that AmCell's allegations merely attempt to utilize the Commission's processes to insulate incumbent management even after a majority of the shares are tendered. Moreover, AmCell's management is in no way deprived of its right to participate in further Commission proceedings. Even if the trustee were to replace directors or officers who participate in such proceedings. they could continue to participate as interested private parties (especially if they hold substantial amounts of AmCell's stock). Finally CNCA asserts that stripped of its constitutional and statutory trimmings, AmCell's argument boils down to an argument that its principals should be allowed to oppose CNCA's applications using funds of AmCell, notwithstanding the fact that this use would be contrary to the interests of the beneficial owner of a majority of its stock. Certainly nothing in Section 309 of the Communications Act, CNCA contends, or any other provision of the Act, supports such an extraordinary result.

32. *Discussion:* The Agreement at issue here provides in pertinent part: "The Trustee shall exercise his right to vote to elect persons to the Board of Directors of Target in a manner wholly independent of any direct or indirect influence of Tenderor, . . ., provided that directors who are representatives of the Trustee shall not constitute a majority of the board of Directors of Target . . . " Section 5(b) Agreement. In addition, this Agreement provides: ' . . . the Trustee may remove and replace any officer, director,

or employee who resigns, whose actions are inconsistent with the Trustee's obligations hereunder, or who seeks to waste corporate assets, hinder the continuity of Target's operations or diminish the value of Target's licensed assets as transferable assets. In all other respects, he shall vote the Acquired Stock, whenever possible, so as to maintain the "status quo" of and to maintain the assets, present management and operations of Target. Agreement Section 5(c).

33. In the Policy Statement we stated:

> Most importantly, the trustee should recognize that he or she receives a special temporary authorization for a limited purpose--that of a temporary conservator or caretaker charged with preserving the nature and character of the corporation in order to facilitate our consideration of the long form license transfer to the ultimate purchaser. . . . We believe that the trustee requires a certain degree of flexibility in the manner in which he or she exercises control over the corporation. Accordingly, we shall not unnecessarily restrict the trustee's authority. The actual exercise of control would be the responsibility of the trustee, who might call for special meetings of the Board of Directors or, if needed, resort to the courts. . The trustee will be permitted, for example, to participate in the election of the Board of Directors. The trustee may elect to serve as a director personally and may fully vote the tendered stock in corporate elections of the Board.

Policy Statement, *supra*, at 1581-82.

34. We further stated in the Policy Statement that:

> Three broad principles must guide the trustee's participation in the management and operations of the company as well as the manner in which he or she exercises the power granted by the STA. First, the trustee has a general obligation to safeguard the assets of the corporation . . . . In addition, . . . the trustee should also be able to protect the buyer from unwarranted or imprudent action by the existing Board or management, such as voting themselves overly generous benefit or wasting corporate assets.

Id. at 1582.

35. We have also stated:

> Second, the trustee should exercise his or her power in a manner which assures the continuity of broadcast operation. In this regard, we believe that the trustee should be able to replace officers, directors or employees who have either resigned or whose actions or proposed actions are inconsistent with the proper discharge of the trustee's obligations.

Id. at 1582.

36. In subsequent decisions, we have approved agreements which contained clauses identical to the one objected to in this case. *See Macfadden II*, *supra*, at 875; (trustee shall vote the shares acquired in favor of any proposal necessary to effect, or consistent with the effectuation of, the Tender Offer; he shall oppose any actions of the directors, officers, employees or shareholders, inconsistent with or which would impede or impair the preservation of corporate assets or capitalization or the effectuation of the Tender Offer; he may remove and replace directors who take actions inconsistent with, or impede or impair the preservation of assets or capitalization or effectuation of the Tender Offer; the trustee is obligated to vote the shares in all other respects so as to maintain the "status quo" and to maintain the present management and operations of the company); *Reliance II*, *supra*, at 1210. In addition, we further stated in this case that after the initial appointment of a minority of directors by the trustee, additional appointments could be necessary if directors must be removed because they act to impede the transaction or harm the company. In such circumstances, we found that the eventual appointment of a majority of directors by the trustee would not be inconsistent with our policy.

37. Under the Williams Act, AmCell's Board and management had 10 business days from the filing of CNCA's 14D-1 disclosure statement with the SEC to study CNCA's offer and make a recommendation to AmCell's shareholders. AmCell's shareholders then have ten business days to evaluate this recommendation as well as AmCell's offer. *See* 17 CFR Section 240.14e-2(a) and 240.14e-1(a). At the end of this period (and any extensions thereof) they can tender or withhold their shares. These timetables are part of a statutory scheme designed with "extreme caution" to "balance the scales equally to protect the corporation, management and shareholders." *Policy Statement*, *supra*, at 1556. Our policies have been formulated to accommodate the neutrality objectives of the Williams Act. Therefore, we believe the Trust Agreement in this case complies with our policies. Furthermore, we believe our policies promote our objective of neutrality. Finally, even if directors and officers or employees were removed from the company, they could still participate in our procedures provided they have the requisite standing.

Financial Qualifications

38. *AmCell's Contentions* : According to AmCell, CNCA does not possess sufficient net liquid assets to obtain the ownership interests sought and to operate the authorized facilities for a period of one year. CCI lacks sufficient financial resources to meet CNCA's stated 72,000,000 cost to purchase the AmCell stock. Quoting figures from CCI's balance sheet AmCell asserts that CCI has current assets of101,676,223 and current liabilities of 39,884,679, thus net current assets equal61,791,544. Since this amount is less than the amount needed for the purchase, then CCI must rely on the loan agreement with Provident Bank (October 28, 1987 loan agreement among Provident National Bank, the Toronto-Dominion Bank, acting through its Grand Cayman Islands Branch, The Irving Trust Company and Kansallis-Osake-Pakki, acting through its New York Branch and CCO). Review of the agreement, according to AmCell, raises a substantial question whether it was the intention of the banks that the funds to be lent to CCO be used to finance the AmCell hostile tender offer. Nothing in the loan agreement specifically authorizes the borrowers to use the loan proceeds to fund hostile tender offers, or even address the possibility. Accordingly, CNCA has assertedly failed to provide sufficient documentation to establish that Provident and the other banks are, in fact, committed to lend the funds for this acquisition. More-

over, there is a question as to whether the funds would be available before a final decision by competent authorities until after an exhaustion of all appeals.

39. *CNCA's Response:* CNCA contends that it has amply demonstrated its financial qualifications to acquire the systems. The plain meaning of Sections 1.6.2 and 1.6.3 of the Loan Agreement is that loan proceeds shall be available for all forms of acquisitions of interests in cellular systems. Given the thoroughness of the documents governing the loan and the use of proceeds thereunder, it is clear that the banks were capable of expressing their intent to limit the rights granted under these sections if they sought to do so, CNCA maintains. Their failure to include a restriction that the loan could only be used in a "friendly" transaction clearly means that no such restriction applies. No provision in the loan agreement otherwise restricts the use of funds for friendly acquisitions only. The funds will be available at the time the tender offer is consummated. Once the STA is issued, CNCA's actions will be wholly in compliance with all applicable "rules and regulations and final orders of the FCC." Thus, the terms set forth in Section 1.2.4 of the Loan Agreement will also be met because CNCA's action will be authorized by, not in violation of, an order of the FCC.

40. *Discussion:* Normally, we will defer consideration of the offeror's qualifications until the step two applications are reached for processing. *Macfadden I, supra*, at 565. *See also, L. P. Media*, 102 F.C.C. 2d at 1286. If we examined the offeror's qualifications at this time, there would be a risk that review of the STA request could take a long time. The procedures set out in the Policy Statement, however, are designed to promote expeditious consideration of STA requests filed as part of a tender offer. The need for expedition was based on other federal policies that encourage prompt government action in the area of tender offers. *See, Policy Statement*, at 1554-57. Those policies would be thwarted to the extent that time is needed to conduct, in essence, a long-form review of the offeror prior to the grant of an STA. Our review at this stage will generally be on the procedures proposed and on the qualifications of the trustee. *Macfadden I, supra*, at 565.

41. However, since CNCA will provide the funds for the purchase of shares to enable the trustee to acquire control of the company, CNCA and the trustee stand or fall together as to financial qualifications. *Macfadden I, supra*, at 566. We require that an applicant demonstrate that it has reasonable assurance that the necessary funds will be available. *Multi - State Communications, Inc. v. FCC*, 590 F.2d 1117, 1119 (D.C. Cir. 1978).[8] To fund this acquisition CCI is relying on funds on hand (cash and cash equivalents on hand) and an existing credit arrangement. In its Condensed Consolidated Balance Sheets for the period ended on September 30, 1987 (unaudited) attached as an exhibit to CCI's 14D-1 filing with the SEC it lists total current assets at101,676,223 and current liabilities at39,884,679. This means that CCI has a total of61,791,544 in net liquid assets.[9] *Advanced Mobile Phone Service, Inc.*, 91 FCC 2d 512 (1982). In addition, CCI relies on an existing loan agreement. Our review of this agreement demonstrates that it meets the reasonable assurance standards. Therefore, we conclude that CNCA is financially qualified to acquire AmCell. Our interpretation of sections 1.6.2 and 1.6.3 of the Loan Agreement leads us to conclude that the funds will be available for the acquisition of franchise interests, including hostile tender offers.[10] We also conclude that once an STA has been granted the funds would be available. *See* Section 1.2.4 of the Loan Agreement (the use of the funds has to be in connection with a transaction which when implemented does not violate the rules and regulations or any final order (not subject to appeal) of the applicable regulatory authority (including without limitation, the FCC). The use of the funds would be in connection with a transaction which does not violate Commission rules and regulations.[11] We agree with CNCA that it is financially qualified under Commission standards.

CONCLUSION

42. We have reviewed the proposal, the informal objection and its opposition and conclude that the informal objection must be denied. We have also reviewed CNCA's request for an STA and conclude that the public interest, convenience, and necessity would be served by granting CNCA's request.

43. ACCORDINGLY, IT IS ORDERED, that the Informal Objection filed by American Cellular Network Corp. IS DENIED.

44. IT IS FURTHER ORDERED, That the step-one applications; file numbers 00506-CL-TC-1-88 for consent to transfer control of Wilmington Cellular Telephone Co. from Shareholders of American Cellular Network Corp. to William D. Hathaway, Trustee; 00507-CL-TC-1-88 for consent to transfer control of New Brunswick Cellular Telephone Co. from Shareholders of American Cellular Network Corp, to William D. Hathaway, Trustee; 00508-CL-TC-1-88 consent to transfer control of Long Branch Cellular Telephone Co. from Shareholders of American Cellular Network Corp. to William D. Hathaway, Trustee; 1384-CF-TC-(2)-88 for consent to transfer control of American Cellular Network Corp. from Shareholders of American Cellular Network Corp. to William D. Hathaway, Trustee and 1385-CF-TC-(5)-88 consent to transfer control of Wilmington Cellular Telephone Co. from Shareholders of American Cellular Network Corp. to William D. Hathaway, Trustee; ARE GRANTED.

45. IT IS FURTHER ORDERED, that the request for a special temporary authorization IS GRANTED to William D. Hathaway, Trustee, for 180 days from the effective date of release of this decision, to solicit, collect and acquire the stock of American Cellular Network, Corp., subject to the representations set out in its applications and pleadings, the conditions set out in the trust instrument, except as limited by this decision or the following conditions:

a) CNCA Acquisition Corp., its parent, Cellular Communications of Ohio and its ultimate parent, Cellular Communications, Inc., and the officers and directors of these corporations (collectively referred to below as CNCA interests), while the trust is in effect, will not nominate a member of the Board of Directors of American Cellular Network Corp. (the corporation) as their representative, or influence the trustee's selection of Directors. Any persons nominated by the Trustee for the Board of the corporation and elected shall be subject to the same restrictions and conditions applicable to the Trustee, and shall have no familial ties or business relationships with the CNCA interests.

b) The CNCA interests will not involve themselves, directly or indirectly, in the operation or management of the corporation, or seek to influence the operation or management of the corporation.

c) Any communications from the trustee to the CNCA interests concerning the tender and purchase of shares from the present stockholders or on the maintenance and operations of the corporation shall be in writing. No communications shall be made by the CNCA interests to the trustee, orally or in writing, regarding the management or operation of the corporation. Communications from the CNCA interests to the trustee as to the tender and purchase of shares must be in writing.

d) The trustee will maintain the *status quo*, as defined in the Policy Statement. This requires that the trustee act so as to maintain the present management and operations of the corporation. The trustee shall have the discretion to oppose only actions inconsistent with the preservation of corporate assets or actions that would be inconsistent with the transfer of control to the CNCA interests, if approved.

e) There will be no substantial changes in the trust instrument except as may be necessary to comply with this order, or as may be approved in advance by the Commission. Any insubstantial changes in that instrument shall be filed promptly (within 10 days of the date of execution) with the Commission, with a copy to the Chief, Mobile Services Division.

f) In the event that the application to transfer control to CNCA Acquisition Corp. is not granted, the trustee will notify the Commission promptly (within 30 days after a final determination or within 30 days after CNCA Acquisition Corp. and the trustee determine that such a transfer will not be pursued) as to his plans for disposing of the stock in the shortest period possible.

g) Any request for an extension of this authorization, if needed, will be filed at least 30 days in advance of the expiration date.

h) The Trustee shall be insulated from other members of his law firm that represent investors in CNCA in the manner required by *RKO General Inc.*, 59 FCC 2d 641 (1976), specifically including:

1) his existing or future compensation shall not be based in any way on the firm's representation of investors in the CNCA interests while he is acting as trustee;

2) he shall be insulated from any involvement in the legal representation of those investors, and will be denied access to the firm's files for those clients, and all other firm members, law clerks or paralegal assistants shall be prohibited from consulting with or otherwise communicating with the the Trustee as to the firm's representation of the investors or as to his trusteeship of American Cellular Network, Corp.

3) He shall not use his own law firm for legal advice in his role as a trustee. Any law firm or firms he selects shall represent no clients with interests in American Cellular Network, Corp. or the CNCA interests.

46. IT IS FURTHER ORDERED, that the effective date of the grant of the special temporary authorization shall be 5:00 p. m.(Eastern Standard Time) on the day immediately following the release of this Memorandum Opinion and Order. If by that time American Cellular Network, Corp. files motion for stay with the court, the effective date will be stayed until the date upon which the court acts on the stay request before it.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] Either directly or through subsidiaries, AmCell controls Wilmington Cellular Telephone Company, New Brunswick Cellular Telephone Company and Long Branch Cellular Telephone Company nonwireline cellular licensees for markets: Wilmington, Delaware; New Brunswick, New Jersey and Long Branch, New Jersey. Amcell also has been granted licenses in the point-to-point microwave radio service.

[2] On February 2, 1988, AmCell's Board of Directors unanimously voted to recommend that the corporation's shareholders reject the CNCA offer, based upon a number of factors, including the opinion of its financial advisor, that the offer is inadequate to the shareholders of the Company from a financial point of view.

[3] N.J.S.A. Section 48:2-51-1 provides:

> No person shall acquire or seek to acquire control of public utility directly or indirectly through the medium of an affiliated or parent corporation or organization, or through the purchase of shares, the election of a board of directors, the acquisition of proxies to vote for the election of directors, or through any other manner, without requesting and receiving the written approval of the Board of Public Utilities. Any agreement reached, or any other action taken, in violation of this act shall be void.

[4] Congress intended to afford interested parties the opportunity to challenge the qualifications of the purchaser of controlling stock in a corporate licensee. Congress intended for this Commission to evaluate carefully the qualifications of the purchaser. Thus, we require strict adherence in step two, including the formal opportunity for public comment, before we will permit the ultimate purchaser to assume control of a licensee. In this regard we note that *Wichita - Hutchinson Co.*, 20 FCC 2d 584 (1969) cited by the Court of Appeals in *Office of Communication of the United Church of Christ v. FCC*, 826 F.2d 101 (D.C. Cir. 1987) is not relevant in Common Carrier proceedings. In *Wichita*, this Commission ordered a hearing to determine, among other things,the relative quality of the programming service provided and proposed by the seller and buyer, respectively, of a broadcast licensee. In the common carrier area, the Commission is not concerned with the programming provided by the licensees.

[5] During 1985, Hathaway agreed to serve as Trustee on behalf of Mintz' client Turner Broadcasting System, Inc. in its unsuccessful takeover bid for CBS Inc.

[6] On February 17, 1988, CNCA filed an amendment to its application which set forth that Hathaway has concluded negotiations with Patton, Boggs & Blow and has agreed to remain as of

counsel to the firm. Under this arragement Hathaway is compensated solely on the basis of a contractual arrangement and does not share in the profits of the firm.

[7] We find it irrelevant to our decision in the instant case that Hathaway agreed to serve as a trustee for a client of Mintz three years ago. In fact, a long form application was filed with the Commission in the Turner/CBS case and no trustee was proposed.

[8] Section 22.917 (c) of the rules provides that applicants for an assignment or transfer of control of a licensee demonstrate financial ability of the assignee or transferee to acquire and operate the facilities by submitting adequate financial information under the guidelines specified in this section. Under these guidelines the requirement to demonstrate that the applicant can operate the station for one year refers to unbuilt facilities and not operational facilities. *WKBD, Inc.*, 2 FCC Rcd 2488 (1987). All of AmCell's controlled systems are operational.

[9] In light of our holding concerning the loan agreement we take into account the total amount of account receivables even though the figure has not been certified by an accountant that the receivables are aged and collectible. However, the total amount in net liquid assets would only be diminished by5,361,442 if not credited with the accounts receivable.

[10] Section 1.6.2 provides that money will be available, "to fund the acquisition by a Restricted Subsidiary of Franchise Interests." Section 1.6.3 permits advancing "funds on terms specified in Schedule 1.6.3 to an Unrestricted Subsidiary for the purpose of funding the acquisition by such Unrestricted Subsidiary of Franchise Interests . . . . "

[11] Commission actions are effective unless stayed. 47 U. S. C. Section 402, 405; 47 CFR Section 1.103.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 83-806

In the Matter of

FCC Regulations Concerning RF Lighting Devices

MEMORANDUM OPINION AND ORDER

Adopted: September 9, 1988; Released: October 20, 1988

By the Commission:

INTRODUCTION

1. By this Memorandum, Opinion and Order, the Commission denies a petition for reconsideration, filed on November 30, 1987, by Linear Corporation (Linear), a manufacturer of control and security alarm devices. Linear has requested that the Commission reconsider its decision in the *Report and Order* [1] in this proceeding with respect to existing technical standards for RF lighting devices as specified in Part 18 of the Rules.[2]

BACKGROUND

2. The Commission initiated this proceeding in 1983 to ascertain whether the technical standards in Part 18 of the Rules were adequate to regulate the use of RF energy for the production of light.[3] At that time, the standards applied to this technology were the same as those for miscellaneous or general ISM (industrial, scientific and medical) equipment. In 1985, in a parallel proceeding, Gen Docket 20718, the Commission concluded that the most suitable technical standards for RF lighting devices were the same as those applied to computing or digital equipment in Part 15 of the Rules.[4] In response to this action in Docket 20718, the National Association of Broadcasters (NAB) filed a petition for reconsideration, questioning whether the adopted standards were suitable to protect AM broadcasting services in the event that the applications of RF lighting technology would proliferate.[5]

3. In response to this petition, the Commission issued a *Notice of Proposed Rule Making* (*Notice*) presenting NAB's concerns and proposing alternative technical standards. The Commission concluded, however, in the Report and Order that the existing technical standards for RF lighting devices were adequate to protect authorized telecommunication services from receiving harmful interference. Specifically, the Commission found that: 1) the existing standards for RF lighting devices were adequate to protect authorized radio services, notably AM broadcasting; 2) there was no merit in developing standards based on protecting a user from his own operations because this would render RF lighting devices economically prohibitive to the consumer; 3) separate standards for consumer and non-consumer applications were warranted; 4) Federally-mandated standards for RF lighting devices were necessary; and 5) the issue of the interference threat of the end-of-life phenomenon for RF lighting devices which have a relatively long life cycle would be better answered by monitoring the interference record of these products over the next few years.[6] The Commission also stated, in response to comments filed on the *Notice*, that the operation of Part 15 devices is not protected from receiving interference from Part 18 devices.[7] Also, the Commission clarified the scope of the provisions made by the International Telecommunication Union (ITU) for the operation of ISM equipment in specific bands.[8] Finally, editorial errors contained in the Code of Federal Regulations in Section 18.305 were corrected.[9]

SUMMARY OF PETITION AND COMMENTS

4. In its petition, Linear contends that the Commission dismissed its comments on the *Notice* without legally sufficient justification. Linear argues that the Commission's decision in the *Report and Order* to retain the existing standards for RF lighting devices fails to promote the use of radio services in accordance with the Communications Act of 1934, as amended, and is thus not in the public interest. Specifically, Linear disagrees with the Commission's decision with respect to such issues as interference to Part 15 devices, end-of-life phenomenon, "single user" interference, the Commission's interference monitoring program and labeling requirements. Finally, Linear also alleges that changes were made in the classification of RF lighting devices and in the field strength requirements for ISM equipment in Section 18.305 of the Rules without proper public notice.

5. Only one party, the National Electrical Manufacturers Association, (NEMA) filed comments on Linear's petition. NEMA states that Linear's arguments are based on flawed premises.[10] In particular, NEMA disagrees with Linear's assumption that Part 15 devices should be treated the same as authorized radio services. It also disagrees with Linear's contention that the existing standards for RF lighting devices are inadequate to deter interference problems and to deal with end-of-life phenomenon. Also, NEMA notes that Linear's allegation of the Commission's illegal modifications of the Rules with respect to the classification of RF lighting devices and the increase in permissible field strength are unfounded. NEMA notes that the Commission, in the *Report and Order*, merely gave more concrete examples of classes of RF lighting applications, and corrected an editorial error in the Code of Federal Regulations concerning the permissible field strength levels.

6. Linear in its reply to NEMA's opposition still disputes the suitability of the existing standards for RF lighting devices. Linear states that NEMA has provided no proof in this proceeding of the suitability of the chosen standards for RF lighting. With respect to the end-of-life phenomenon, Linear believes that the standards should be met at all times and not just during normal operating conditions.

DISCUSSION AND DECISION

7. *Inadequately addressed comments*. Linear's contention that the Commission has dismissed its comments without sufficient justification in this proceeding is unfounded. Linear's comments on the Notice focused on field strength levels at frequencies above 30 MHz, and the possible interference to control and security equipment operating

under Part 15 of the Rules. Linear failed to address the main issue of the adequacy of the proposed field strength levels below 30 MHz. The question of field strength levels above 30 MHz had been considered extensively by the Commission in Gen Docket 20718. When the Commission adopted the *Notice* in this proceeding, the issue which remained to be addressed was whether field strength limits below 30 MHz, in addition to the existing conduction limits, were necessary to protect AM broadcasting services from receiving interference from RF lighting devices. Linear's comments were not responsive to the *Notice*. Hence, in accordance with Section 1.425 of the Rules, these comments were not relevant to the issues, and therefore, beyond the scope of this proceeding.

8. *Suitability of existing standards*. Linear disputes the adequacy of the emission limits which the Commission has chosen to apply to RF lighting devices. First, Linear believes that the emission limits established by the Commission for RF lighting devices do not provide sufficient protection to authorized services. Further, it argues that there is no evidence in this proceeding to support the claim that RF lighting devices have the same spectrum signature as digital equipment and therefore should be treated similarly. Linear indicates that the Commission should enforce the same standards for Part 15 and Part 18 devices, if it intends to protect authorized radio services adequately.

9. The emission limits chosen by the Commission are the same as those for computing or digital equipment regulated under Part 15 of the Rules. The reason that these emission limits were chosen was because the spectrum signature of RF lighting devices is similar to that of digital equipment. This has been amply demonstrated in the test reports filed in this proceeding by NEMA and General Electric among others. Equipment with the same spectrum signature and power have the same interference potential. Therefore, it is logical to apply the same standards to both types of equipment. This issue has already been addressed in depth by the Commission in another proceeding, Docket 20718.[11] In response to Linear's claim that different standards apply to Part 15 and Part 18 devices that have the same interference potential to authorized services, it should be noted that the Part 15 standards are already under review in another proceeding.[12]

10. As emphasized in the *Report and Order*, the major issue to be resolved, at this time, is that of field strength limits and the development of procedures which can produce repeatable results when used for making field strength measurements below 30 MHz. This issue is still under study by the International Electrotechnical Commission (IEC) and the Commission for all types of radio frequency devices. The Commission and the industry have been working with the IEC in trying to develop these limits and the associated measurement procedures. Therefore, as stated in the *Report and Order*, we find that conduction limits are adequate until such time as viable field strength limits and adequate measurement procedures are developed.

11. *Interference to Part 15 devices*. Linear objects to the operating conditions of Section 15.3 of the Rules. This section states that users of Part 15 devices must accept interference that may be caused by any authorized radio service, other Part 15 devices, or Part 18 equipment which includes RF lighting devices. Further, Linear raises the question of "whether it is reasonable for the Commission to permit a Part 18 lighting device, which has no radio communication purpose, to emit more RF energy than a device which is intended to provide radio communication."[13] Linear states that the Commission should respect its mandate to "make available . . . a radio communication service"[14] by changing the conditions of Section 15.3 to protect Part 15 communication devices from interference caused by the operation of non-communications equipment.

12. This proceeding was initiated in order to study the interference potential of RF lighting devices. The operating conditions set forth for equipment used in accordance with the provisions of Part 15 of the Rules are beyond the scope of this proceeding. Any change in the basic policy of Part 15 of the Rules should be treated in a separate proceeding. It should be noted that in our limited experience to date we have received no complaints of harmful interference to Part 15 devices from RF lighting devices.

13. *Classification of RF lighting devices*. Linear notes that in a *Memorandum Opinion and Order* released August 30, 1985, the Commission defined commercial/industrial products as those exhibiting any of the following characteristics: (1) restricted distribution to businesses; (2) custom installation; and, (3) operating on other than 110 volts, 60 hertz AC.[15] In addition, Linear observes that, in the *Report and Order* in this proceeding, the Commission indicated that it would apply different emission limitations for consumer and non-consumer devices based on the ambient conditions of the operating environment.[16] Linear asks whether this is an additional fourth characteristic to be used to determine the proper classification of RF lighting devices. Linear also asks whether the Commission, using this new characteristic, will require 1) an industrial device located in a residential environment to comply with the standards for consumer equipment, and 2) the user or the manufacturer of a device to correct interference caused by an industrial device when used in a residential environment. Linear urges the Commission to explain its decision on the matter, and recommends that non-consumer devices used in residential environments be subject to the same standards as consumer devices.

14. The Commission did not change the classification of RF lighting devices in the *Report and Order*. The *Report and Order* gives a more precise definition of what is meant by consumer and non-consumer equipment.[17] The language used in the *Report and Order* is consistent with Section 18.107(g) of the Rules as well as the *Memorandum, Opinion and Order*. That Section defines consumer ISM equipment as intended for use by the general public in a residential environment, notwithstanding use in other areas. All other ISM devices which do not fit the definition of consumer equipment in Section 18.107(g) of the Rules are considered to be non-consumer products. The Commission has always considered the operating environment in establishing the standards and the classification of RF lighting devices. In addition, Linear's suggestion that non-consumer RF lighting devices operated in a residential environment comply with the standards for consumer devices is unreasonable both technically and economically. It is unrealistic to expect non-consumer high powered devices to meet the same technical standards as consumer devices,[18] especially in the case of conduction limits which are related to the actual current drawn by the equipment and its operating voltage. Consumer devices usually employ an operating voltage of about 120 volts, whereas

non-consumer devices can operate as high as 550 volts. It is economically prohibitive to suppress the radio frequency signals that might be conducted back into the power lines by non-consumer devices to the same levels as that from consumer devices. The amount of suppression needed for non-consumer devices would usually result in excessive levels of current leakage in the device and create potential shock hazards for users.[19] We must, therefore, tolerate the few cases of non-consumer devices which might be located in a residential environment. Typical examples of such cases are the installation of high-powered lighting systems in a suburban hospital. For these reasons, Linear's request is not acceptable.

15. The issue concerning responsibility for interference is clearly defined in the existing regulations.[20] ISM equipment may not be marketed if it does not comply with the relevant administrative and technical provisions of the Commission's Rules. The user or operator of ISM equipment must follow the marketer's instructions for operating the equipment. In accordance with Section 18.111 of the Rules, the user of a non-consumer or a consumer RF lighting device in a residential environment will be held responsible by the Commission for any interference caused if the manufacturer or party responsible for the marketing of that non-consumer device has, in fact, followed the Commission's regulations applicable to that device.

16. *End - of - life phenomenon*. Linear feels that the interference potential of RF lighting devices is much greater than the Commission has assumed. Specifically, Linear expresses concern over the possible increase in emission levels from RF lighting devices at their end of life. The evidence in this proceeding regarding the end of life phenomenon is inconclusive. RF lighting devices have not been in existence long enough to ascertain whether or not the emissions at the end-of-life of a bulb increase to the extent that they could cause harmful interference to telecommunication services. In light of the limited evidence of this interference potential, we believe it is more prudent to deal with such an issue by monitoring interference reports. If it appears in the future that there is a valid interference concern, then it will be revisited by the Commission. At the present time, it would not be in the public interest to base a standard on emissions which have been demonstrated in this proceeding to occur only during a small fraction of the operating life of a RF lighting device.

17. " *Single user interference* ". Linear disagrees with the interference model from which the limits for RF lighting devices are derived. The limits are based on the need to protect the user of a receiver from the operation of a RF lighting device located 10 meters away and separated by a wall. Linear rejects the Commission's decision to continue applying standards derived on such an interference model arguing it provides no protection to a user who might wish to operate his receiver in the same room as a RF lighting device. We already indicated in the *Report and Order* that it would not be cost-effective to impose standards designed to protect a user from receiving interference from his own lighting devices. We stated that such a problem is not a real issue because both the interfering device and victim receiver are under the control of only one party and can be easily corrected through reorientation of the antenna or movement of the devices.[21] Linear has offered no arguments to persuade us to change this decision.

18. *Monitoring program*. Linear believes that the Commission should provide more details on the program it promised to follow to monitor the interference potential of RF lighting devices. It should be kept in mind that, before reaching its decision in this proceeding, the Commission undertook an interference monitoring program for RF lighting devices for a period of two years (1983-85). At the time, the Commission required companies authorized to market RF lighting devices to provide their customers with the name and address of a contact person in their office so that consumers could report any interference problems that might have occurred. In addition, the companies had to report to the Commission, on a regular basis, information concerning their products. The Commission concluded that although very few devices were actually being marketed, no harmful interference problems were being reported. For this reason, in Docket 20718, the Commission decided to regulate RF lighting devices the same as other Part 18 devices, and to eliminate the requirement that such information be filed periodically. Consequently, we intend to monitor any reports of the interference from RF lighting devices in the same manner as any other Part 18 devices. In addition, as deemed necessary, we will sample these devices to ensure their continued compliance with our technical standards.[22]

19. *Labeling of RF lighting devices*. Linear argues that the Commission has failed to establish a procedure by which the consumer can be warned of the interference potential of RF lighting devices. Linear suggests that the Commission require manufacturers to place a label containing language addressing specifically the interference potential to home electronic products on their RF lighting devices or on their packaging. Also, Linear alleges that the Commission has not fulfilled its obligation because it did not adopt in the *Report and Order* specific labeling requirements for RF lighting devices after it had indicated in the August 30, 1985, *Memorandum Opinion and Order*,[23] that while Gen Docket 83-806 is pending, the information required in Section 18.213 of the Rules will have to be provided in the instruction manual or on the packaging.

20. We do not accept Linear's suggestion to adopt specific language requirements in this case. In Section 18.213 of the Rules, the Commission already has information requirements more comprehensive than those suggested by Linear. Our requirements cover more than just interference potential, and include the requirement for suppliers of Part 18 devices to specify what measures the consumer should take in cases of interference, and how the devices should be maintained. Requiring the manufacturer or party responsible for the marketing to include information on maintenance, interference potential and corrective measures in the instruction manual or packaging is more effective than the suggested action proposed by Linear. Further, we believe the choice of the language is better left to the discretion of the manufacturer in light of the diverse applications of Part 18 devices.

21. *Amendment of Section 18. 305 (b)*. In response to Linear's claim that the Commission violated the Administrative Procedures Act by amending Section 18.305 of the Rules in the Report and Order without sufficient prior notice, we are constrained to point out that this Section was amended to correct a publishing error contained in the 1986 edition of Title 47 of the Code of Federal Regulations (47 CFR). When Section 18.305 was adopted in 1985 it clearly indicated that the permissible increase in field strength for miscellaneous, medical diathermy, and

ultrasonic equipment was expressed in terms of the square root of the quotient of the generated power in watts divided by 500.[24] However, by error, the October 1986 edition of the Code of Federal Regulations failed to specify that the square root of the entire quotient was to be considered.[25] The error is still reflected in the October 1987 edition of 47 CFR, and is expected to be corrected in the 1988 edition.

SUMMARY AND CONCLUSION

22. The Commission finds that Linear has not presented any information in its petition for reconsideration that had not been considered previously by the Commission in reaching the decision in this proceeding. Also, the Commission finds that Linear's petition does not contain any persuasive arguments or evidence to warrant a change in policy regarding the status of Part 15 devices. For these reasons and in light of the above discussion, the Commission finds no merit in Linear's request for reconsideration of the decisions in the Report and Order, in General Docket 83-806.

23. Accordingly, IT IS ORDERED That the petition for reconsideration filed by Linear Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

FOOTNOTES

[1] 2 FCC Rcd 6775 (52 Fed. Reg. 43197) (1987).

[2] RF lighting devices create light by converting 60 Hz AC electrical power into radio frequencies used to stimulate a gas inside bulbs. RF lighting devices normally operate below 30 MHz.

[3] *See Notice of Inquiry*, Gen Docket 83-806, FCC 83-360, released August 5, 1983, 48 Fed. Reg. 37235 (1983).

[4] *See Third Report and Order*, Gen Docket 20718, 58 RR 2d 1096 (50 Fed. Reg. 36061) (1985).

[5] *See Notice of Proposed Rule Making*, Gen Docket 83-806, FCC 86-205, released May 8, 1986, 51 Fed. Reg. 18004 (1986).

[6] *See Report and Order*, *supra*, at paras. 9-16.

[7] *Id.* at para. 17.

[8] *Id.* at para. 18.

[9] *Id.* at para. 19.

[10] *See* NEMA opposition to petition for reconsideration filed December 31, 1987, at para. 3.

[11] *See Third Report and Order*, Gen Docket 20718, *supra*, at paras. 15-18.

[12] *See Notice of Proposed Rule Making*, Gen Docket 87-389, 2 FCC Rcd 6135 (1987).

[13] *See* Linear petition, pp. 3-4.

[14] Cf. 47 U.S.C. Section 151.

[15] *See Memorandum, Opinion, and Order*, FCC 85-469, released August 30, 1985, p. 4, footnote 8.

[16] *See Report and Order*, *supra*, at para. 12.

[17] *See Report and Order*, *supra*, footnote 12.

[18] The IEC recently published a recommendation acknowledging the need for different standards for consumer and non-consumer ISM applications. Cf. IEC Publication 23, "Determination of Limits for Industrial, Scientific and Medical Equipment," 1987, at para. 3.

[19] The issue of radiation limits below 30 MHz is still under study. However, the imposition of the same radiation limits for both consumer and non-consumer devices is also highly unlikely.

[20] *See* Sections 18.111-115 of Title 47 of the Code of Federal Regulations.

[21] *See Report and Order*, *supra*, at para. 9.

[22] *See* Sections 2.943 and 2.945 of Title 47 of the Code of Federal Regulations.

[23] *See Memorandum, Opinion and Order*, *supra*, at para. 15.

[24] *See Third Report and Order*, Gen Docket 20718, *supra* at Appendix B, p. B10.

[25] *See* Title 47 of the Code of Federal Regulations, October 1986, p. 531.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-180

In the Matter of

SOUTHWESTERN BELL
TELEPHONE COMPANY

Transmittal Nos. 1537 and 1560
Revisions to Tariff F.C.C. No. 68

ORDER

Adopted: May 23, 1988; Released: May 24, 1988

By the Deputy Chief, Common Carrier Bureau:

1. Southwestern Bell Telephone Company (SWB) has requested an extension of time in which to file its direct case in response to the Common Carrier Bureau's Order Designating Issues for Investigation in the above-captioned matter.[1] SWB seeks permission to file its direct case on or before June 13, 1988 rather than on or before the May 23, 1988 date set forth in the *Designation Order*.[2] That Order required SWB to file certain information concerning the "Network Data Report" (NDR) provision of its tariff relating to 800 access service.

2. SWB states that it has engaged in discussions with MCI and with US Sprint in order to identify alternatives to the NDR requirement that would allow SWB to jurisdictionally separate 800 access service traffic. As a result of those discussions, SWB is preparing to file a tariff that will obviate the concerns that led to the instant proceeding. SWB also states that it plans to file an alternative to NDR that will permit an interexchange carrier the option of providing a percent interstate usage factor that will be used to jurisdictionally separate 800 access service traffic. It argues that filing a direct case on or before May 23, 1988, would require the assembly and submission of data that will serve no useful purpose because the underlying issues become moot by virtue of the addition of an alternative to the NDR provision in SWB's tariff.

3. The Common Carrier Bureau has reviewed SWB's motion and has determined the requested 21-day delay does not appear to prejudice any interested party. We therefore conclude that good cause has been shown for grant of SWB's motion.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Southwestern Bell Telephone Company's motion for an extension of time IS GRANTED.

FEDERAL COMMUINICATION COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-180

In the Matter of

SOUTHWESTERN BELL
TELEPHONE COMPANY

Transmittal Nos. 1537 and 1560
Revisions to Tariff F.C.C. No. 68

ORDER

Adopted: June 13, 1988; Released: June 14, 1988

By the Chief, Common Carrier Bureau:

1. Southwestern Bell Telephone Company (SWB) has requested a further extension of time in which to file its direct case in response to the Common Carrier Bureau's Order Designating Issues for Investigation in the above-captioned matter.[1] That Order required SWB to file certain information concerning the "Network Data Report" (NDR) provision of its tariff relating to 800 access service on or before May 23, 1988. On May 18, 1988 SWB filed a motion for extension of time requesting a 21-day delay in filing its direct case.[2] The Order granting this extension was adopted on May 23, 1988 and released May 24, 1988.[3] SWB now seeks permission for an indefinite extension of time for the filing of its direct case in this matter.[4]

2. On May 20, 1988, SWB filed tariff revisions (Transmittal No. 1658) that would eliminate the mandatory NDR requirement. The time for filing petitions to reject or suspend the tariff revisions contained in Transmittal No. 1658 expired June 6, 1988. There were no petitions filed and SWB states that it expects the tariff revisions will become effective on June 24, 1988. SWB asserts that, upon the effectiveness of the tariff revisions contained in Transmittal No. 1658, the mandatory NDR requirement will no longer exist and that the matters at issue in this docket will become moot. SWB suggests that filing of a direct case or other action in this proceeding, at this time, would constitute a waste of the Bureau's and Commission's resources.

3. The Common Carrier Bureau has reviewed SWB's motion and has determined that the indefinite extension does not appear to prejudice any interested party. We therefore conclude that good cause has been shown for grant of SWB's motion.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, that Southwestern Bell Telephone Company's motion for extension of time IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Southwestern Bell Telephone Company, Transmittal Nos. 1537 and 1560, CC Docket No. 88-180, DA 88-480, 3 FCC Rcd. 2339 (1988) (*Designation Order*).

[2] Southwestern Bell Motion for Extension of Time to File Direct Case, CC Docket No. 88-180, filed May 18, 1988.

[3] Southwestern Bell Telephone Company, Transmittal Nos. 1537 and 1560, Revisions to Tariff F.C.C. No. 68, CC Docket No. 88-180, DA 88-785, released May 24, 1988.

[4] Southwestern Bell Motion For Further Extension of Time to File Direct Case, CC Docket No. 88-180, filed June 9, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

AMERITECH OPERATING COMPANIES — Transmittal Nos. 200 and 203

Revisions to Tariff F.C.C. No. 2

CINCINNATI BELL TELEPHONE COMPANY — Transmittal No. 499

Revisions to Tariff F.C.C. No. 35

THE GTE TELEPHONE OPERATING COMPANIES — Transmittal No. 422

Revisions to Tariff F.C.C. No. 1

NEW ENGLAND TELEPHONE COMPANY — Transmittal No. 929

Revisions to Tariff F.C.C. 40

NEW YORK TELEPHONE COMPANY — Transmittal Nos. 912 and 914

Revisions to Tariff F.C.C. No. 41

SOUTHWESTERN BELL TELEPHONE COMPANY — Transmittal Nos. 1676 and 1681

Revisions to Tariff F.C.C. No. 68

ORDER

Adopted: August 15, 1988; Released: August 17, 1988

By the Chief, Common Carrier Bureau:

1. By the above-referenced transmittals, various local exchange carriers (LECs) have proposed revisions to their tariffs for access services to establish rates and charges for Special Access Individual Case Basis (ICB) High Capacity DS3 offerings.[1] The revisions are scheduled to become effective on dates ranging from August 19, 1988, to September 10, 1988.[2]

2. On March 28, 1988, the Bureau released an Order initiating an investigation of a number of LECs' proposed ICB rates, designating for investigation issues concerning the LECs' continued use of ICB rates for DS3 offerings, and establishing a pleading cycle. [3] The above-referenced transmittals raise the same issues as those transmittals subject to our *Designation Order*. Therefore, the instant transmittals will be subject to the outcome of that investigation. We also grant the LECs listed above special permission to advance the effective dates of these transmittals.

3. Accordingly, IT IS ORDERED that the Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal Nos. 200 and 203, Cincinnati Bell Telephone Company, Tariff F.C.C. No. 35, Transmittal No. 499, GTE Telephone Operating Companies, Tariff F.C.C. No. 1, Transmittal No. 422, New England Telephone Company, Tariff F.C.C. No. 40, Transmittal No. 929, New York Telephone Company, Tariff F.C.C. No. 41, Transmittal Nos. 912 and 914, and Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal Nos. 1676 and 1681, are subject to the investigation instituted in CC Docket No. 88-136.

4. IT IS FURTHER ORDERED that the local exchange carriers listed in paragraph 3, *supra*, may file tariff revisions, to be effective on not less than one day's notice, in order to advance the effective dates of the above-referenced transmittals. For this purpose, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 88-366.

5. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

6. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, all local exchange carriers subject to this investigation shall keep accurate account of all amounts received pursuant to Individual Case Basis rates for DS3 services which are the subject of such investigation.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] We note that while the LECs' filings also propose ICB rates for other services, this Order deals only with the proposed ICB rates for DS3 and DS3-equivalent services.

[2] No petitions have been filed to reject, suspend, or investigate any of these transmittals.

[3] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 *(Designation Order)*.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

AMERITECH OPERATING COMPANIES — Transmittal Nos. 207, 208, 211, 212, and 213

Revisions to Tariff F.C.C. No. 2

CINCINNATI BELL TELEPHONE COMPANY — Transmittal No. 501

Revisions to Tariff F.C.C. No. 35

SOUTHERN NEW ENGLAND TELEPHONE COMPANY — Transmittal No. 435

Revisions to Tariff F.C.C. 34

SOUTHWESTERN BELL TELEPHONE COMPANY — Transmittal Nos. 1696 and 1698

Revisions to Tariff F.C.C. No. 68

MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY
NORTHWESTERN BELL TELEPHONE COMPANY
PACIFIC NORTHWEST BELL TELEPHONE COMPANY — Transmittal No. 184

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: September 21, 1988 Released: September 22, 1988

By the Chief, Common Carrier Bureau:

1. By the above-referenced transmittals, various local exchange carriers (LECs) have proposed revisions to their tariffs for access services to establish rates and charges for Special Access Individual Case Basis (ICB) High Capacity DS3 offerings.[1] The revisions are scheduled to become effective on dates ranging from September 23, 1988, to October 15, 1988.[2]

2. On March 28, 1988, the Bureau released an Order initiating an investigation of a number of LECs' proposed ICB rates, designating for investigation issues concerning the LECs' continued use of ICB rates for DS3 offerings, and establishing a pleading cycle. [3] The above-referenced transmittals raise the same issues as those transmittals subject to our Designation *Order*. Therefore, the instant transmittals will be subject to the outcome of that investigation. We also grant the LECs listed above special permission to advance the effective dates of these transmittals.

3. Accordingly, IT IS ORDERED that the Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal Nos. 207, 208, 211, 212, and 213, Cincinnati Bell Telephone Company, Tariff F.C.C. No. 35, Transmittal No. 501, Southern New England Telephone Company, Tariff F.C.C. No. 34, Transmittal No. 435, Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal Nos. 1696 and 1698, Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company, Tariff F.C.C. No. 1, Transmittal No. 184 are subject to the investigation instituted in CC Docket No. 88-136.

4. IT IS FURTHER ORDERED that the local exchange carriers listed in paragraph 3, *supra*, may file tariff revisions, to be effective on not less than one day's notice, in order to advance the effective dates of the above-referenced transmittals. For this purpose, we waive Sections 61.56, 61.58, and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, and assign Special Permission No. 88-428.

5. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions ARE SUSPENDED for one day.

6. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, all local exchange carriers subject to this investigation shall keep accurate account of all amounts received pursuant to Individual Case Basis rates for DS3 services which are the subject of such investigation.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] We note that while the LECs' filings also propose ICB rates for other services, this Order deals only with the proposed ICB rates for DS3 and DS3-equivalent services.

[2] No petitions have been filed to reject, suspend, or investigate any of these transmittals.

[3] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order Designating Issues for Investigation, 3 FCC Rcd 2582 (1988) (*Designation Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTHWESTERN BELL
TELEPHONE COMPANY

Petition for Waiver
of Part 69 Regarding
Interim 900 Access Service

MEMORANDUM OPINION AND ORDER

Adopted: September 27, 1988 Released: September 28, 1988

By the Chief, Common Carrier Bureau:

1. On July 29, 1988, Southwestern Bell Telephone Company (Southwestern) filed a petition for waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, in order to establish a separate rate element for the recovery of costs incurred in the provision of 900 Access Service.[1] The petition for waiver is unopposed.

2. Southwestern states that it has received numerous inquiries from interexchange carriers (ICs) concerning 900 Access Service. Southwestern Petition at 1. It asserts that for the service to be provided, it must make certain network modifications in order that 900 Service calls can be routed to the appropriate 900 Service provider. *Id.* Part 69 of the Commission's Rules, 47 C.F.R. Part 69, does not contain a separate rate element for 900 Access Service that would allow Southwestern to recover these costs. Therefore, Southwestern requests a waiver of the rules to allow it to establish one. It maintains that grant of the waiver will serve the public interest by enabling it to meet customer requests for 900 Access Service at rates based on the cost of providing this service to ICs. *Id.* at 2.[2]

3. The Bureau has granted a number of similar requests for waivers of Part 69 of the Commission's Rules. [3] In so doing, the Bureau determined that the public interest would be served by permitting an exchange carrier to employ a separate rate element to recover the costs of providing 900 Access Service.[4] We have determined that this same finding applies to the waiver sought by Southwestern, and we therefore grant Southwestern's request for a waiver.

4. ACCORDINGLY, IT IS ORDERED that the petition for waiver filed by Southwestern Bell Telephone Company IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Also on that date, Southwestern filed Transmittal No. 1683 to introduce 900 Access Service. Transmittal 1683, which is scheduled to become effective September 29, 1988, is unopposed.

[2] Southwestern also requested in its petition a waiver of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. However, a request for a waiver of Part 61 requires submission of an application for special permission. Southwestern has filed such an application and it was granted by the Chief, Tariff Division, Common Carrier Bureau, on September 21, 1988. Therefore, Southwestern's request for a waiver of Section 61.38 contained in its petition is now moot.

[3] *E.g.*, Mountain States Telephone and Telegraph Company, Mimeo No. 4560, released May 16, 1986; Ameritech Operating Companies, 2 FCC Rcd 4217 (1987); New York Telephone Company, 3 FCC Rcd 2993 (1988); National Exchange Carrier Association, Inc., 3 FCC Rcd 4572 (1988); United Telecommunications, Inc., DA 88-1350, released Aug. 31, 1988.

[4] *See, e.g.*, Mountain States Telephone and Telegraph Company, *supra* at paras. 10-11; National Exchange Carrier Association, Inc., supra, 3 FCC Rcd at 4572.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-471

In the Matter of

AT&T COMMUNICATIONS Tariff F.C.C. No. 15 Competitive Pricing Plans; Holiday Rate Plan — Transmittal No. 1215

ORDER

Adopted: October 7, 1988; Released: October 11, 1988

By the Chief, Common Carrier Bureau:

1. On September 29, 1988, MCI Telecommunications Corporation (MCI) filed a motion to delete an information request, and a motion for expedited consideration of the motion to delete, related to certain issues designated for investigation in the above-captioned proceeding.[1] The direct cases to be filed to address those designated issues are due October 20, 1988.

2. In its motion, MCI requests that the Commission delete the information request in paragraph 45 of the *Investigation Order* because the request is broader than necessary to decide the present case. MCI Motion To Delete at 1-2. MCI argues that the competitive necessity test, upon which the Commission relies, is dependent upon the terms of AT&T's and MCI's offerings, which are not in the record.[2] MCI asserts that since the competitive necessity test focuses only on offers made to a specific customer, and not to other customers in the marketplace, the information requested in paragraph 45 of the *Investigation Order* is irrelevant to a determination of the legality of the tariff. [3] MCI concludes that since the information required in paragraph 45 has no bearing on the legality of the tariff, and the survey of marketing practices and analysis of data required by that paragraph will delay final consideration of the legality of the tariff, it should be removed from the *Investigation Order*. *Id.* at 6.

3. MCI requests expedited consideration of its motion to delete so that its resources can be efficiently focused on those matters which MCI asserts are relevant to the Commission's investigation. MCI Motion To Expedite at 1-2. Given the fact that the direct cases are due October 20, 1988, MCI requests the Commission to order that oppositions to MCI's motion to delete be filed by October 11, 1988, offers to file its reply by October 12, 1988,[4] and requests a Commission ruling on the motion to delete by October 14, 1988. *Id.* at 3.

4. The Common Carrier Bureau has reviewed the motions filed by MCI and finds that no compelling arguments have been made to warrant a change in the issues designated in the *Investigation Order*. Although we recognize that the legality of the tariff "largely revolve[s] around the relative price" of the MCI and AT&T offers,[5] we also recognize that certain larger policy issues must be investigated in order to evaluate the benefit or harm to customers taking service under general offerings.[6] Consideration of the policy issues involved requires information regarding the extent of individual customer offerings and the circumstances surrounding these offerings.[7] Therefore, we conclude that the issues designated in paragraph 45 of the *Investigation Order* are relevant and necessary to a determination of the lawfulness of the tariff in question.

5. Accordingly, IT IS HEREBY ORDERED, pursuant to Sections 4(j) and 5(c) of the Communications Act of 1934, 47 U.S.C. §§ 154(j), 155(c), and the authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291, that the motions of MCI Telecommunications Corporation, described in paragraph 1 above, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] AT&T Communications, Transmittal No. 1215, CC Docket No. 88-471, Memorandum Opinion and Order, FCC 88-299, Mimeo No. 37467, released Sept. 20, 1988 (*Investigation Order*).

[2] MCI Motion To Delete at 4 (citing *Investigation Order* at para. 36).

[3] *Id.* at 5. MCI reasserts its position that the tariff offering in question is *per se* illegal, and that no factual inquiries are therefore necessary. *Id.* at 5 n.7.

[4] Pursuant to Section 1.45 of the Commission's rules, 47 C.F.R. § 1.45, oppositions to MCI's motions would be due October 11, 1988, and MCI's reply due October 17, 1988.

[5] Investigation Order at para. 36.

[6] *Id.* at para. 34.

[7] *Id.* at para. 39.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MID ATLANTIC TELECOM, INC. File No. I-T-C-88-183

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 4, 1988; Released: October 18, 1988

By the Chief, International Facilities Division:

1. The captioned application filed on July 29, 1988, by Mid Atlantic Telecom, Inc. (Mid Atlantic), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various international points. The application was placed on public notice on August 17, 1988. No comments were received.

2. Mid Atlantic is already providing domestic resale service. It now proposes to resell international switched voice services in competition with other carriers already providing resale of such service. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by Mid Atlantic.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-88-183 IS GRANTED IN PART, and Mid Atlantic is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, and FTCC's Tariff F.C.C. No. 23, between the United States and the points listed in those tariffs.

5. Mid Atlantic's request to resell the services of TRT Telecommunications Corporation pursuant to contractual agreement is hereby deferred pending the filing of that contractual agreement.

6. Copies of any operating agreements entered into between Mid Atlantic and its correspondents shall be filed with the Commission within 30 days of their execution.

7. IT IS FURTHER ORDERED that Mid Atlantic shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203 and Part 61 of the Commission's rules, 47 C.F.R. Part 61, for the services authorized in this order.

8. IT IS FURTHER ORDERED that Mid Atlantic shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1987).

9. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of public notice of this order *(see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n. 2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE HAWAIIAN TELEPHONE COMPANY INCORPORATED — File No. I-T-C-88-191

Application for authority to acquire and operate facilities between Hawaii and Italy.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 5, 1988; Released: October 18, 1988

By the Chief, International Facilities Division:

1. The captioned application, filed on August 19, 1988, by GTE Hawaiian Telephone Company, Incorporated (HTC), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate facilities for direct service between Hawaii and Italy. The application was placed on public notice on August 31, 1988. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct International Message Telephone Service (IMTS) service between Hawaii and Italy by HTC.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-88-191 IS GRANTED, and HTC is authorized to:

a. lease from WU World Communications, Inc. and operate a one-half interest in two voice-grade circuits in the TAT-5/MAT-1 cable system;

b. lease and operate necessary connecting facilities between Honolulu and New York and between New York and the TAT-5 interconnection point at Greenhill, Rhode Island; and

c. use said facilities to provide HTC's IMTS services between Hawaii and Italy and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between HTC and its correspondent in Italy, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This authorization is effective on its release date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T OF THE VIRGIN ISLANDS, INC. File No. I-T-C-88-196

Application for authority to acquire and operate facilities between the U.S. Virgin Islands and Dominica.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 5, 1988; Released: October 18, 1988

By the Chief, International Facilities Division:

1. The captioned application, filed on August 24, 1988, by AT&T of the Virgin Islands, Inc. (AT&T-VI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate facilities for direct service between the U.S. Virgin Islands and Dominica. The application was placed on public notice on August 31, 1988. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. Virgin Islands and Dominica by AT&T-VI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-88-196 IS GRANTED, and AT&T-VI is authorized to:

a. lease from Cable and Wireless (West Indies) and operate three half circuits in the Northern and Central sections of the analog Eastern Caribbean Microwave System; and

b. use said facilities together with authorized capacity in the St. Thomas - Tortola Microwave System to provide AT&T-VI's regularly authorized services between the U.S. Virgin Islands and Dominica and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between AT&T-VI and its correspondent in Dominica, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CAPITAL NETWORK SYSTEM, INC. — File No. I-T-C-88-192

Application for authority to operate as an international resale carrier.

AUTOMATED COMMUNICATIONS, INC. — File No. I-T-C-88-194

Application for authority to operate as an international resale carrier.

CALL TECHNOLOGY CORPORATION — File No. I-T-C-88-195

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 5, 1988; Released: October 18, 1988

By the Chief, International Facilities Division:

1. The captioned applications, filed on August 22, 18 and 23, 1988 respectively, by Capitol Network System, Inc. (CNS), Automated Communications, Inc. (ACI), and Call Technology, Corp. (Call Tech), respectively request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various international points. The applications were placed on public notice August 31, 1988. No comments were received.

2. The applicants are already providing domestic resale service. They now propose to resell international switched voice services in competition with other common carriers already providing resale of such services. In recent authorizations of new entrants the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by CNS, ACS and Call Tech.

4. Accordingly, IT IS ORDERED that application File Nos. I-T-C-88-192, I-T-C-88-194 and I-T-C-88-195 ARE GRANTED, and a) CNS is authorized to provide international switched voice services by the resale of the international switched voice services set forth in MCI's Tariff F.C.C. No. 1 between the United States and those points listed in that tariff; and b) ACI and Call Tech are authorized to provide international switched voice service by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and those points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicants and their correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1987).

8. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* the cases cited in Teltec Saving Communications Co., Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WESTERN UNION CORPORATION,
Complainant,

v. File No. E-88-33

TRT TELECOMMUNICATIONS COMPANY,
Defendant.

ORDER

Adopted: October 7, 1988; Released: October 18, 1988

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On November 2, 1987, Western Union Corporation filed a formal complaint against TRT Telecommunications Corporation seeking damages for alleged overcharges for the routing of outbound international telex traffic. After considerable negotiation, the parties reached a mutual settlement of this matter and a companion matter in the United States District Court for the District of Columbia, *TRT Telecommunications Corp v. Western Union Telegraph Co.*, No. 87-2760 (JHP). Consequently, the parties have filed a joint motion to dismiss this complaint. Since there no longer is a controversy between the parties, we find that it is in the public interest to grant the motion.

2. Accordingly, IT IS ORDERED, pursuant to authority delegated in 47 C.F.R. § 0.291, that the Motion to Dismiss filed by the parties IS GRANTED.

3. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HRTC JOINT VENTURE — File No. CSG-88-031-ML

For modification of license of its domestic-fixed satellite earth station (call sign E880546) at East Lansing, Michigan for the provision of video, audio, data and teleconferencing services to points in the U.S., Canada and Mexico.

IDB COMMUNICATIONS GROUP, INC. — File No. CSG-88-081-ML

For modification of license of its transmit/receive earth station (call sign E7754) at Culver City, California to add a 5.5 meter 4/6 GHz earth station antenna for communication with points in the U.S., Canada and Mexico.

IDB COMMUNICATIONS GROUP, INC. — File No. CSG-88-082-ML

For modification of license of its transmit/receive earth station (call sign E7754) at Culver, City California to add a 7.0 meter 4/6 GHz antenna for communication with points in the U.S., Canada and Mexico.

CONOCO COMMUNICATIONS, INC. — File No. CSG-88-084-ML

For modification of license of its fixed transmit/receive earth station (call sign E88113) at Delisle, Mississippi, for communication with points in the U.S. and Mexico.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: October 7, 1988; Released: October 18, 1988

By the Chief, International Facilities Division:

1. The Commission has under consideration the above captioned applications requesting authority under Title III of the Communications Act of 1934, as amended, to provide communications services between points in the United States and Canada and Mexico. These applications were placed on the Commission's public notice. No comments were received.

2. *HRTC Joint Venture (HRTC)* (File No. CSG-88-031-ML). HRTC is a licensed common carrier joint venture established to develop a teleport to support the mid-Michigan region. In its application, HRTC requests authority to modify its license for a 4/6 GHz fixed transmit/receive earth station, call sign E880546, at East Lansing, Michigan.[1] HRTC intends to utilize the facility for the transmission of video and associated audio, data and teleconferencing services to customers throughout the U.S., Canada and Mexico. The facility will communicate with all U.S. domestic satellites (ALSAT), as well as the ANIK and Morelos satellite systems.

3. *IDB Communications Group, Inc. (IDB)* (File Nos. CSG-88-081-ML and CSG-88-082-ML). IDB is an established common carrier currently providing domestic and international audio, video, voice and data communications via earth station and terrestrial facilities.[2] By the instant applications, IDB seeks to modify its license for domestic-fixed transmit/receive earth station E7754, located at Culver City, California. In application File No. CSG-88-081-ML, IDB seeks permission to add a 5.5 meter 4/6 GHz antenna to the domestic-fixed earth station. Application File No. CSG-88-082-ML, is a request for permission to add a 7 meter 4/6 GHz antenna to the Culver City earth station. IDB states that it intends to use the 5.5 meter and 7 meter antennas to communicate with ALSAT, ANIK and Morelos satellite systems for the provision of service between all states and territories of the U.S. and Canada and Mexico.

4. *Conoco Communications, Inc. (Conoco)* (File No. CSG-88-084-ML). Conoco is the wholly-owned subsidiary of Conoco, Inc., an integrated oil company engaged in all facets of oil and gas exploration and production, as well as the refining and transportation of crude oil, gas and refined products. In its application, Conoco requests modification of its license for domestic-fixed transmit/receive earth station E88113, located at Delisle, Mississippi in order to communicate with ALSAT and the Morelos I and II satellites. [3] It intends to use these satellite facilities for internal company use in order to provide data transmission services between its geographically dispersed facilities in the U.S. and Mexico.

DISCUSSION

5. In 1981, following consultations with the Department of State, the Commission gave initial approval for use of U.S. domestic satellites for the transmission of certain international telecommunications services to points within the footprint of those satellites. The Commission determined that domestic satellites could be used for these services where INTELSAT is incapable of providing a

service or where it would be clearly uneconomical or impractical to use the INTELSAT system for that service. The Commission stated that applications meeting this standard could not be implemented until: 1) the concurrence of the appropriate governmental entities had been obtained; 2) the consultation requirement of INTELSAT Article XIV(d) had been fulfilled; and 3) the Chief, Common Carrier Bureau issued an order authorizing implementation of service. In its *Transborder I* decision, the Commission concluded that where a domestic satellite network is already in place that can be accessed in a transborder location with the addition of a small, low-cost, receive-only earth station, it would be uneconomical and impractical to utilize the INTELSAT system. The Commission found that the alternative method of using INTELSAT facilities would involve significant additional costs due to multi-satellite hops and the use of additional terrestrial facilities. In addition, the Commission found that the use of the INTELSAT system to duplicate programming already available on domestic satellites would be an inefficient use of the available radio spectrum.

6. The Commission has made similar findings with respect to the business services between the U.S. and Canada and Mexico. The Commission noted that the global system traditionally had not been used for traffic between the U.S. and Canada and Mexico. It found that service via INTELSAT would be uneconomical and impractical since it would involve: 1) higher costs necessary to duplicate networks already in place; 2) higher costs and inefficiency associated with multi-satellite hops and terrestrial links which would be required to extend transmission to a customer's premises; and 3) an inefficient use of the available radio spectrum.

7. The applicants before us seek to provide satellite services to points in Canada and Mexico via all U.S. domestic satellites as well as the ANIK and Morelos satellites. The Commission has concluded on previous occasions that use of domestic earth station facilities for the provision of services similar, if not identical, to those proposed here is consistent with established transborder policy. The applications are also in accord with current INTELSAT Article XIV(d) consultations and therefore will cause neither technical interference nor significant economic harm to the global system. Since all prerequisites for the issuance of final authorizations have been completed, we conclude that grant of these applications will serve the public interest. We note, however, that not all U.S. domestic satellites have been consulted under Article XIV(d) for service to Canada and Mexico. Thus, our authorization will be limited to only those satellites that have been consulted.

8. Accordingly, IT IS ORDERED that the applications of HRTC (File No. CSG-88-031-ML), IDB (File Nos. CSG-88-081-ML and CSG-88-082-ML) and Conoco (File No. CSG-88-084-ML) ARE GRANTED consistent with Attachments 1 and 2, and may be implemented without any further action by the Commission.

9. IT IS FURTHER ORDERED that the domestic-fixed earth station, call sign E7754, modified in IDB applications CSG-88-081-ML and CSG-88-082-ML, is assigned a new call sign E881143.

10. This authorization constitutes the final step for the provision of transborder services through domestic satellites only insofar as the U.S. regulatory process is concerned. It does not, however, dispense with any requirements that may be imposed by the other country involved.

11. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained.

12. This order is issued under Section 0.291 of the Commission's Rules and Regulations and is effective upon adoption. Petitions for reconsideration or under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] The Commission's Satellite Radio Branch granted HRTC a construction permit for the facility on May 6, 1988. *See* HRTC Joint Venture, File No. 1077-DSE-P/L-88.

[2] IDB has been authorized to provide transborder services between the U.S. and Canada and Mexico.

[3] The Commission's Satellite Radio Branch granted Conoco's application for a construction permit September 30, 1988. *See* Conoco CommunicationsGroup, Inc., File No. 2369-DSE-P/L-88.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE & WIRELESS COMMUNICATIONS, INC. File No. I-T-C-88-132

Application for authority to resell switched voice services of American Telephone and Telegraph Company to provide service from the contiguous United States to Botswana, the Cape Verde Islands, Nepal and the Niger Republic.

CABLE & WIRELESS COMMUNICATIONS, INC. File No. I-T-C-88-156

Application for authority to resell switched voice services of US Sprint Communications Company to provide service from the United States to Canada and other international points.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 11, 1988; Released: October 18, 1988

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned applications of Cable & Wireless Communications, Inc. (C&W) requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched voice services of American Telephone and Telegraph Company (AT&T) and US Sprint Communications Company (US Sprint). The applications were placed on the Commission's public notice May 18, 1988 and July 6, 1988 respectively. No comments were filed in response to the notice. On September 20, 1988, C&W filed a letter with the Commission clarifying certain aspects of its application.

2. C&W is a domestic common carrier currently authorized to provide international switched voice resale services between the United States and numerous foreign points.[1] In application File No. I-T-C-88-132, C&W seeks authority to resell, pursuant to tariff, the switched voice services of AT&T in order to provide service between the contiguous United States and Botswana, the Cape Verde Islands, Nepal and the Niger Republic. In application File No. I-T-C-88-156, C&W requests authority to resell, pursuant to contractual arrangement, the switched voice services of US Sprint in order to supplement its service to Australia, Belgium, Canada, Denmark, France, Greece, Ireland, Italy, Japan, the Netherlands, New Zealand, Singapore, Spain, Sweden, Switzerland, Taiwan, the United Kingdom[2], and Venezuela. Sections 211(a) and 201(b) of the Communications Act permit carriers to arrange inter-carrier dealings by contract rather than tariff. [3] Furthermore, the Commission's *Competitive Carrier International* decision[4] does not place any restrictions on the acquisition of facilities by contract by dominant, foreign-owned carriers such as C&W.

3. In recent authorizations of new entrants to the international market, the Commission has found that increased competition for resale services is beneficial to consumers.[5] With respect to the instant applications, we find that the market will support the provision of additional service by C&W and that the added competition will be in the public interest.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-88-132 IS GRANTED and C&W is authorized to provide international switched voice services by resale of the international switched voice services set forth in AT&T's FCC Tariff No.1 between the contiguous United States and Botswana, the Cape Verde Islands, Nepal and the Niger Republic.

5. IT IS FURTHER ORDERED that application File No. I-T-C-88-156 IS GRANTED and C&W is authorized to resell, pursuant to contractual arrangement, the services of US Sprint to provide international switched voice services between the United States and Australia, Belgium, Canada, Denmark, France Greece, Ireland, Italy, Japan, the Netherlands, New Zealand, Singapore, Spain, Sweden, Switzerland, Taiwan, the United Kingdom (via the services of British Telecom), and Venezuela.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, Cable & Wireless Communications Inc., File No. I-T-C-88-007 *et. al.*, DA 88-567 (released April 29, 1988).

[2] US Sprint traffic to the United Kingdom is handled by British Telecom.

[3] *See also* Bell Telephone Co. of Pennsylvania v. FCC, 502 F. 2d 1250, 1276-8 (3rd Cir. 1974), *cert. denied* 422 U.S. 1026 (1975), reh'g denied 423 U.S. 886 (1975).

[4] International Carrier Policies, 102 FCC 2d 812, 842-3 (1985); *aff'd on recon.*, CC Docket No. 85-107, FCC 86-339 (released August 7, 1986).

[5] *See* cases cited in Teltec Saving Communications Co., Mimeo No. 3548, n. 2. (released April 4, 1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-459

In the Matter of

Amendment of Section 73.202(b), RM-5738
Table of Allotments,
FM Broadcast Stations.
(Garapan, Saipan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 14, 1988; Released: October 18, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd. 6509 (1987), proposing to allot Channel 258C to Garapan, Saipan, as its second FM channel, at the request of Serafin M. Dela Cruz (petitioner).[1] Comments in support of the proposal were filed by the petitioner. Channel 258C can be allotted to Garapan in compliance with the Commission's minimum distance separation requirements.[2]

2. We believe that the public interest would be served by allocating Channel 258C to Garapan since it would provide the community with an opportunity for an additional local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 2, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Garapan, Saipan	230A, 250C2,[3] 258C

3. The window period for filing applications will open on **December 5, 1988,** and close on **January 3, 1989.**

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] In a separate proceeding (MM Docket 87-254) Class C Channel 250 is proposed for allotment to Garapan.

[2] Coordinates for Channel 258C at Garapan are North Latitude 15-10-44 and East Longitude 145-45-00.

[3] Channel 250C2 is allotted to Garapan in a *Report and Order* in MM Docket 87-254, adopted simultaneously with this *Report and Order*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-496

In the Matter of

Amendment of Section 73.202(b),	RM-6346
Table of Allotments,	RM-6469
FM Broadcast Stations.	
(Boalsburg, Clearfield, Jersey Shore,	
Renovo, St. Marys and Tioga,	
Pennsylvania)	

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: September 21, 1988; Released: October 18, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it two mutually exclusive petitions for rule making. Kenneth H. Breon, Jr. and John K. Hogg, Jr. d/b/a Covenant Broadcasting Company (Covenant), requests the substitution of Channel 227B1 for Channel 228A at Jersey Shore, Pennsylvania, and the modification of its license for Station WJSA-FM to specify operation on the higher powered channel. In addition, Covenant requests the substitution of Channel 241A for unused but applied for Channel 226A at Renovo, Pennsylvania, and the substitution of Channel 234A for unused but applied for Channel 227A at Tioga, Pennsylvania.[1] Covenant states that it will apply for Channel 227B1 if allotted to Jersey Shore. Olivia T. Rennekamp and Cary H. Simpson d/b/a The Elk-Cameron Broadcasting Company (Elk-Cameron), request the substitution of Channel 230B1 for Channel 232A at St. Marys, Pennsylvania, and the modification of its license for Station WKBI-FM to specify operation on the higher powered channel. In addition, it requests the substitution of Channel 226B1 for Channel 230B1 at Clearfield, Pennsylvania, and the modification of Clearfield Broadcasters' license for Station WQYX(FM) to specify operation on the alternate channel, the substitution of Channel 229A for Channel 225A at Boalsburg, Pennsylvania, which is unused but applied for, and the substitution of Channel 254A for Channel 226A at Renovo, Pennsylvania, which is also unused but applied for.[2] Elk-Cameron states that it will apply for Channel 230B1 at St. Marys, if allotted. These proposals are mutually exclusive since the site proposed by Elk-Cameron for Channel 226B1 at Clearfield does not meet the required spacing to the proposed allotment of Channel 227B1 at Jersey Shore.

2. Elk-Cameron, in a supplement to its petition, states its willingness to reimburse Clearfield Broadcasters for the costs associated with its change in channel. In addition, it states that it will reimburse Elk-Cameron for the reasonable costs associated with any relocation of its transmitter to a site, other than that which it seeks in its application (BPH-871019IA), should such a move be required to avoid a short-spacing to the allotment of Channel 230B1 at St. Marys.

3. Where the allotment of a new channel requires that another existing station change its channel of operation, the Commission generally will not propose the allotment if the channel change would also require the existing licensee to relocate its transmitter, unless the affected licensee states its agreement to the relocation prior to the initiation of the rule making proceeding. *See Claremore, Oklahoma, et. al.*, 3 FCC Rcd 4037 (1988), *rev. pending.* While Elk-Cameron's petition does not include such an agreement, we believe that the public interest would be served, in this instance, by proposing the substitution of channels at Clearfield and issuing an appropriate Order to Show Cause to Clearfield Broadcasters. Station WQYX(FM) at Clearfield, which currently operates on Channel 228A, was recently modified to specify operation on Channel 230B1 in MM Docket 86-185, 2 FCC Rcd 3313 (1987). However, Station WQYX(FM) cannot operate on Channel 230B1 at its presently licensed site since it would result in a short-spacing to the present operation of Station WKBI-FM at St. Marys. In addition, while the site proposed by Station WQYX(FM) in its application for Channel 230B1 (BPH-871019IA) is not suitable for use on Channel 226B1 since it would cause a short-spacing to Station WWSE, Channel 227B, Jamestown, New York, this application was returned because it resulted in a short-spacing to Station WQKX, Channel 231B, Sunbury, Pennsylvania. [3] Therefore, since Station WQYX(FM) must relocate from its present site, we believe the public interest would be served by soliciting Clearfield Broadcasters' comments on the proposed modification of its license to specify operation on Channel 226B1 and its willingness to move to a non-short-spaced site which may permit the allotment of Channel 227B1 to Jersey Shore and Channel 230B1 to Clearfield, Pennsylvania. We wish to reiterate that this action should not be construed as requiring Clearfield Broadcasters to agree to move its transmitter to a site which would permit the proposed upgrades for Stations WQYX and WJSA-FM. However, should it reiterate its desire to utilize a site which conflicts with the St. Marys and Jersey Shore upgrades, we expect Clearfield Broadcasters to submit sufficient information to demonstrate that use of its desired non-conforming transmitter site and retention of the Class A allotments at St. Marys and Jersey Shore would better serve the public interest than would the allotment of Class B1 channels to all three communities. *See, e.g., Topsail Beach and Wilmington, North Carolina*, FCC Rcd 159 (1988).

4. Channel 227B1 can be allotted to Jersey Shore in compliance with the Commission's minimum distance separation requirements with a site restriction of 15.0 kilometers (9.3 miles) east to avoid a short-spacing to Station WWSE, Channel 227B, Jamestown, New York, and to the pending application of Station WMMR, Channel 227B, Philadelphia, Pennsylvania (BPH-871015ID). Channel 234A can be allotted to Tioga and Channel 254A can be allotted to Renovo in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction and can also be used at the sites specified in the pending applications. Channel 230B1 can be allotted to St. Marys in compliance with the Commission's minimum distance separation requirements and can be used at Station WKBI-FM's present site. Channel 226B1 can be allotted to Clearfield

in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.8 kilometers (6.7 miles) southeast to avoid a short-spacing to proposed Channel 230B1 at St. Marys. Channel 229A can be allotted to Boalsburg in compliance with the Commission's minimum distance separation requirements and can be used at the sites specified in the pending applications.[4] Canadian concurrence in these allotments is required since the communities are located within 320 kilometers (200 miles) of the U.S.-Canadian border.

5. We shall also propose to modify Covenant's license for Station WJSA-FM to specify operation on Channel 227B1 in lieu of its present Channel 228A at Jersey Shore, Pennsylvania, and Elk-Cameron's license for Station WKBI-FM to specify operation on Channel 230B1 in lieu of its present Channel 232A at St. Marys, Pennsylvania. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of Channel 227B1 at Jersey Shore or Channel 230B1 at St. Marys. In addition, neither petitioner will be required to demonstrate the availability of an additional equivalent channel for use by other interested parties.

6. We believe the public interest would be served by seeking comments on the alternative proposals since it could provide Jersey Shore or St. Marys with expanded FM service. In order to make a determination as to which proposal would better serve the public interest, we are providing the proponents with an opportunity to further demonstrate why its community should receive the higher class allotment. In this regard, the parties should be guided by the criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). In particular, both petitioners should submit a gain area showing indicating the population and square miles of the increased area to be served. *See Greenup, Kentucky, and Athens, Ohio*, 2 FCC Rcd 4319 (1987). Accordingly, we seek comments on the proposed amendments of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

City	Channel No. Present	Proposed
	OPTION I	
Jersey Shore, Pennsylvania	228A, 249A	227B1, 249A
Renovo, Pennsylvania	226A	241A
Tioga, Pennsylvania	227A	234A
	OPTION II	
Boalsburg, Pennsylvania	225A	229A
Clearfield, Pennsylvania	230B1	226B1
Renovo, Pennsylvania	226A	254A
St. Marys, Pennsylvania	232A	230B1

7. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Clearfield Broadcasters, Inc., licensee of Station WQYX, Clearfield, Pennsylvania, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 226B1 instead of its present Channel 230B1 as proposed herein.

8. Pursuant to Section 1.87 of the Commission's Rules, Clearfield Broadcasters, Inc. may, not later than **December 9, 1988,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Clearfield Broadcasters to furnish additional information. If Clearfield Broadcasters raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date refered to above, Clearfield Broadcasters will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

9. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the licensee of Station WQYX, as follows: Clearfield Broadcasters, Inc., 110 Healy Avenue, Clearfield, Pennsylvania 16830.

10. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the applicants for Channel 225A at Boalsburg, Pennsylvania, Channel 226A at Renovo, Pennsylvania, and Channel 227A at Tioga, Pennsylvania, as follows:

Boalsburg Applicants

Davies E. Bahr
Box 312 Elks Country
Boalsburg, PA 16827
(BPH-880218MA)

BBK Broadcasting Company
1804 Maryland
Elk Grove Village, IL 60007
(BPH-880219MP)

Claravista, Inc.
600 Chestnut Avenue
Altoona, PA 16601
(BPH-880219MQ)

Baseline, Incorporated
174 Hilltop Park
State College, PA 16801
(BPH-880219MU)

Nittany Valley Broadcasters, Ltd.
312 Mary Elizabeth Street
Boalsburg, PA 16827
(BPH-880219MG)

Renovo Applicant

J.C. Broadcasting
R.D.1, Box 460
Cogan Station, PA 17728
(BPH-880729MA)

Tioga Applicant

Anita L. Clark
688 Ellistown Road
Waverly, NY 14892
(BPH-880714NR)

11. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particu-

lar, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

12. Interested parties may file comments on or before **December 9, 1988,** and reply comments on or before **December 27, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John K. Hogg, Jr. Covenant Broadcasting Company 262 Allegheny Street Jersey Shore, Pennsylvania 17740 (Petitioner)	Anne Thomas Paxson, Esq. Borsari & Paxson 2100 M Street, N.W., Suite 610 Washington, D.C. 20037 (Counsel for Elk-Cameron)

13. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

14. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Channel 226A was allotted to Renovo in the omnibus FM rule making, MM Docket 84-231. The Commission has stated that Docket 84-231 channels could be substituted, after the filing window had closed, without requiring a showing of compelling need or Commission error, providing the substitute channel complies with the spacing requirements to each of the sites specified in the pending applications. *See, Memorandum Opinion and Order,* 51 FR 36401, October 10, 1986. No applications were filed during the window period which closed on April 7, 1988. However, on July 29, 1988, after Covenant and Elk Cameron filed their petitions for rule making, an application for Channel 226A at Renovo was filed by JC Broadcasting (ARN-880729MA). Channel 227A at Tioga also was not applied for during the filing window. However, on July 14, 1988, after Covenant filed the instant petition, Anita L. Clark filed an application for its use (ARN-880714NR).

[2] In a Supplement to the petition, Elk-Cameron requests the allotment of Channel 254A, rather than 241A, as a substitute for Channel 226A at Renovo. It states that Channel 254A at Renovo, at the site proposed by JC Broadcasting (ARN-880729MA), will not have the limiting effect on the selection of a transmitter site at Southport, New York, if Channel 241A is allotted there as proposed in MM Docket 87-590. Since both channels can be used at JC Broadcasting's applied for site, we will propose the allotment of the possibly less restrictive Channel 254A in lieu of Channel 241A at Renovo.

[3] On June 27, 1988, Clearfield Broadcasters filed a petition for reconsideration of the dismissal of its application and request for waiver.

[4] The coordinates for Channel 227B1 at Jersey Shore are North Latitude 41-09-22 and West Longitude 77-05-17. The coordinates for Channel 234A at Tioga are North Latitude 41-54-36 and West Longitude 77-08-06. The coordinates for Channel 254A at Renovo are North Latitude 41-19-36 and West Longitude 77-45-00. The coordinates for Channel 230B1 at St. Marys are North Latitude 41-24-56 and West Longitude 78-33-56. The coordinates for Channel 226B1 at Clearfield are North Latitude 40-58-30 and West Longitude 78-20-00. The coordinates for Channel 229A at Boalsburg are North Latitude 40-46-30 and West Longitude 77-47-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-495

In the Matter of

Amendment of Section 73.202(b), RM-6421
Table of Allotments,
FM Broadcast Stations.
(Montauk, New York)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1988; Released: October 18, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Nanette Markunas (petitioner) requesting the allotment of Channel 235A to Montauk, New York, as the community's second local FM service. Petitioner states that she will apply for the channel, if allotted.[1] Channel 235A can be allotted to Montauk in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.9 kilometers (3.1 miles) southwest to avoid a short-spacing to Station WOCB-FM, Channel 235B, West Yarmouth, Massachusetts.[2,3]

2. We believe the public interest would be served by proposing the allotment of Channel 236A to Montauk, New York, since an interest in providing the community with its second local FM service has been expressed. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Montauk, New York	284A	235A, 284A

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **December 9, 1988,** and reply comments on or before **December 27, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Nanette Markunas
Box 2576
Montauk, New York 11954
(Petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should

also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] By letter of June 13, 1988, petitioner requested withdrawal of her pending application for use of Channel 284A at Montauk (BPH-870331MO).

[2] The Commission has before it in MM Docket 87-486 the counterproposal of Joan Orr to substitute Channel 236B for Channel 235B at West Yarmouth and to modify the license of Station WOCB-FM accordingly in order to allot Channel 232A to Dennis or Dennisport, Massachusetts, and Channel 230A to Provincetown, Massachusetts. *See* 2 FCC Rcd 6793 (1987) and Public Notice of counterproposal given on January 27, 1988, Rept. No. 1431. Should this proposal be adopted, Channel 235A could be allotted to Montauk without requiring the imposition of a site restriction.

[3] The coordinates for this allotment are North Latitude 41-01-00 and West Longitude 72-00-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-493

In the Matter of

Amendment of Section 73.202(b),	RM-6431
Table of Allotments,	RM-6445
FM Broadcast Stations.	
(West Point and Blair, Nebraska)	

NOTICE OF PROPOSED RULE MAKING

Adopted: September 26, 1988; Released: October 19, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it two mutually exclusive petitions for rule making. Kelly Communications, Inc. (Kelly) requests the substitution of Channel 300C1 for Channel 300A at West Point, Nebraska, and the modification of its construction permit for Station KWPN-FM to specify the higher class channel. LDH Communications, Inc. (LDH) requests the substitution of Channel 299A for Channel 292A at Blair, Nebraska, and the modification of its license for Station KBWH-FM to specify the new Class A channel. West Point and Blair are located approximately 52 kilometers apart. However, the Commission's Rules stipulate that first adjacent Class A and C1 allotments be separated by 129 kilometers.

2. Kelly states that the upgrading of Station KWPN-FM to Class C1 facilities will serve the public interest by permitting it to expand the station's coverage area. Channel 300C1 can be allotted to West Point in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter site specified in Station KWPN-FM's construction permit.[1]

3. LDH desires the change in channel so that it may relocate its transmitter to the southeast. It states that Station KBWH-FM is the only radio station licensed to Blair but that the community receives service from eleven stations licensed to nearby Omaha, Nebraska. LDH notes that it is precluded from upgrading its station to a higher class channel. However it believes that the relocation of its transmitter to the southeast will enable it to more effectively compete in the market while also providing improved service to Blair and the neighboring communities. Channel 299A can be allotted to Blair in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.6 kilometers (7.2 miles) southeast to avoid a short-spacing to Station KWPN-FM, West Point, Nebraska, with its Class A facilities.[2]

4. We believe that both proposals warrant further consideration since the adoption of either proposal could enhance the service being provided by Station KWPN at West Point or Station KBWH-FM at Blair. However, in order to make a determination as to which of the two proposals should be selected, we request the proponents to further demonstrate why their community should receive the new allotment. In this regard, the parties should be guided by the criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 F.C.C. 2d 88 (1982).

5. As requested, we shall also propose to modify Kelly's construction permit for Station KWPN-FM to specify operation on Channel 300C1. In accordance with Section 1.420(g) of the Commission's Rules, we shall neither accept competing expressions of interest in use of the channel at West Point nor require the petitioner to demonstrate the availability of an additional equivalent channel for use by such interested parties. We shall also propose to modify LDH's license for Station KBWH to specify operation on Channel 299A. The procedures outlined in *Modification of FM and TV Licenses*, 98 FCC 2d 916 (1984), and Section 1.420(g) of the Commission's Rules do not apply in this case since no upgrade in facilities is contemplated.

6. We believe the public interest would be served by alternatively proposing the substitution of Channel 300C1 for Channel 300A at West Point, Nebraska, since it could permit Station KWPN-FM to expand its coverage area or the substitution of Channel 299A for Channel 292A at Blair, Nebraska, since it could permit Station KBWH-FM to relocate its transmitter site. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Blair, Nebraska	292A	299A
	OR	
West Point, Nebraska	300A	300C1

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **December 12, 1988,** and reply comments on or before **December 27, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

B. Jay Baraff, Esq.
Baraff, Koerner, Olender & Hochberg, P.C.
2033 M Street, N.W., Suite 203
Washington, D.C. 20036
(Counsel to Kelly Communications)

David Honig, Esq.
6032 Ocean Pines
Berlin, Maryland 21811
(Counsel to LDH Communications)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for the West Point allotment are North Latitude 41-47-06 and West Longitude 96-40-39.

[2] The coordinates for the Blair allotment are North Latitude 41-29-27 and West Longitude 96-01-01.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-494

In the Matter of

Amendment of Section 73.202(b), RM-6412
Table of Allotments,
FM Broadcast Stations.
(Clarinda, Iowa)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1988; Released: October 19, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by G.O. Radio, Ltd. (petitioner), requesting the substitution of Channel 291C2 for Channel 292A at Clarinda, Iowa, and the modification of its license for Station KQIS-FM to specify the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. Channel 291C2 can be alloted to Clarinda in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.3 kilometers (5.8 miles) east to avoid a short-spacing to unused but applied for Channel 290A at Omaha, Nebraska.[1] As requested, we shall also propose to modify petitioner's license for Station KQIS-FM to specify operation on Channel 291C2. Competing expressions of interest in use of the channel at Clarinda will not be considered. *See* Section 1.420(g) of the Commission's Rules.

3. We believe the public interest would be served by proposing the allocation of Channel 291C2 to Clarinda, Iowa, since it could provide the community and its environs with expanded radio service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Clarinda, Iowa	292A	291C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 12, 1988,** and reply comments on or before **December 27, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Glenn Olson, President
G.O. Radio Ltd.
Box 550
Webster City, Iowa 50595
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 40-42-42 and West Longitude 94-55-55.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-492

In the Matter of

Amendment of Section 73.202(b), RM-6414
Table of Allotments,
FM Broadcast Stations.
(Borger, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1988; Released: October 19, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Fun Radio Group, Inc. (petitioner), licensee of Station KDXR(FM), Channel 282C, Borger, Texas, the Commission considers herein a petition for rule making seeking the substitution of Channel 282C1 for Channel 282C at Borger and modification of its license accordingly.[1] Petitioner submitted information in support of its proposal to downgrade its facilities.

2. Petitioner states that it wishes to relocate its station's current transmitter site to an area that the Federal Aviation Administration (FAA) is unlikely to approve a full Class C operations. Therefore, petitioner seeks to have its facilities downgraded in order to avoid FAA problems.

3. Although the petitioner specifies a desire to utilize a site 37.1 kilometers (23.0 miles) southwest of the city,[2] we have determined that Channel 282C1 can be substituted for Channel 282C consistent with the Commission's minimum distance separation requirements from the site specified in the current construction permit. Therefore, we shall propose the substitution at the site specified in the construction permit (BPH-860312IF) at coordinates 35-30-33 and 101-38-54. [3]

4. As requested, we shall propose to modify the license of Station KDXR(FM) to specify operation on Channel 282C1 in lieu of Channel 282C. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest nor require that the petitioner demonstrate the availability of an additional equivalent channel at Borger.

5. The Commission believes it is in the public interest to solicit comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Borger, Texas	282C	282C1

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **December 12, 1988,** and reply comments on or before **December 27, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

J. Dominic Monahan, Esquire
Peter H. Doyle, Esquire
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Washington, D. C. 20037
(Counsels for petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Station KDXR(FM) is licensed as a Class C2 facility and has a construction permit for a full Class C facility. *See Reclassification of FM Facilities Pursuant* to BC Docket 80-90 Public Notice, 52 FR 12964, April 20, 1987.

[2] The restricted site coordinates are 35-23-17 and 101-38-10.

[3] The site restriction is 28.3 kilometers (17.6 miles) southwest of the city.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-491

In the Matter of

Amendment of Section 73.202(b), RM-6371
Table of Allotments,
FM Broadcast Stations.
(Vacaville, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1988; Released: October 19, 1988

By the Deputy Chief, Policy and Rules Division:

1. Quick Broadcasting, Inc. (petitioner), licensee of Station KUIC(FM), Channel 237A, Vacaville, California, has filed a petition for rule making seeking the substitution of Channel 237B1 for Channel 237A and modification of its license to specify operation on the higher-powered channel.

2. We believe that this proposal is in the public interest, since it could provide a first expanded coverage FM service to Vacaville. A staff engineering analysis has verified that Channel 237B1 can be substituted for Channel 237A at the site petitioner has specified in its proposal, in conformity with the minimum distance separation requirements of the Commission's Rules.[1]

3. We propose to substitute Channel 237B1 for Channel 237A at Vacaville, California. As requested, we also propose to modify the Class A license of Station KUIC(FM) to specify operation on Channel 237B1. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 237B1 at Vacaville.

4. Accordingly, in order to provide Vacaville with its first expanded coverage FM service, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Vacaville, California	237A	237B1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 12, 1988,** and reply comments on or before **December 27, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Roger J. Metzler, Esq.
Farrand, Cooper, Metzler
& Bruiniers
701 Sutter St., 7th Flr.
San Francisco, CA 94109

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The reference coordinates used for this proposal are 38-27-30 and 121-58-22, which will site the transmitter 11.3 kilometers (7.0 miles) north of Vacaville.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-490

In the Matter of

Amendment of Section 73.202(b), RM-6400
Table of Allotments,
FM Broadcast Stations.
(Parker, Arizona)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1988; Released: October 19, 1988

By the Deputy Chief, Policy and Rules Division:

1. KMDX-FM99, Inc. (petitioner), licensee of Station KMDX(FM), Channel 257A, Parker, Arizona, has filed a petition for rule making seeking the substitution of Channel 257C2 for Channel 257A and modification of its license accordingly, to provide that community with its first expanded coverage FM service.

2. We believe the petitioner's proposal warrants consideration since it could provide a first wide coverage area FM service to the community. A staff engineering analysis has determined that Channel 257C2 can be allotted to Parker, Arizona, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is sited in an area at least 13.1 kilometers (8.2 miles) west[1] to avoid short-spacing to Channel 256C, Prescott, Arizona.[2]

3. In view of the above, we shall propose the allotment and the modification of the Class A license of Station KMDX(FM) accordingly. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the proposed use of Channel 257C2 at Parker.

4. Accordingly, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with regard to Parker, Arizona, as follows:

	Channel No.	
City	Present	Proposed
Parker, Arizona	257A	257C2

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 12, 1988,** and reply comments on or before **December 27, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Peter Tannenwald, Esq
Arent, Fox, Kintner,
Plotkin & Kahn
1050 Connecticut Ave., NW
Washington, D.C. 20036-5339

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Reference coordinates utilized in this determination are 34-07-51 and 114-25-40.

[2] Although the petitioner expressed a desire to utilize its present site, at coordinates 34-07-22 and 114-12-40, to accommodate its modification proposal, that location is short spaced to Channel 256C, Prescott, AZ, at coordinates 34-33-08 and 112-26-56, which is reserved for Station KNOT-FM per MM Docket No. 84-512. The distance between the two reference points is 169 kilometers whereas 188 kilometers is required between first adjacent Class C and C2 channels. However, utilizing the site specified in an application (860709IC) filed by Station KNOT-FM, at coordinates 34-41-15 and 112-07-01, the spacing requirements to petitioner's proposal are met (202.5 kilometers actual distance vs. 188 kilometers required). Therefore, if petitioner wishes to operate on Channel 257C2, if allotted, from its current site, it must wait until Station KNOT-FM is issued a license at its specified application site.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-324

In the Matter of

Amendment of Section 73.202(b),	RM-5750
Table of Allotments,	RM-5865
FM Broadcast Stations.	RM-6386
(Columbus, Eupora, and Marion, Mississippi, and Reform, Alabama)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 14, 1988; Released: October 19, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission herein considers the *Notice of Proposed Rule Making*, 2 FCC Rcd 5116 (1987), issued in response to two different petitions for rule making. Tri County Broadcasting Company (Tri County), requested the substitution of FM Channel 241C2 for Channel 269A at Eupora, Mississippi, and modification of its license for Station WEXA(FM), to specify operation on Channel 241C2. Radio Columbus, Inc. (Radio Columbus) requested the substitution of FM Channel 241C2 for Channel 276A at Columbus, Mississippi, and modification of its license for Station WMBC to specify operation on Channel 241C2. Radio Columbus, Inc. and Sis Sound, Inc. (Sis Sound) filed joint comments. Tri County, Radio Columbus and Rego Broadcasting Company (Rego) filed comments and a counterproposal and petition for partial reconsideration and clarification.[2] Radio Columbus and Sis Sound filed joint reply comments. Tri County filed reply comments as did Marion Broadcasting Company, Inc. (Marion Broadcasting). [3] Marion Broadcasting filed a petition for special relief and motion to accept the petition. In response to the counterproposal, Rego, Tri County and Charisma Broadcasting Company filed comments.

2. As indicated in the *Notice*, Channel 241C2 could provide Eupora with its first wide coverage area channel or a second such channel to Columbus. Section 73.207 of the Commission's Rules requires 190 kilometers between Class C2 co-channels and since the two communities are approximately 79 kilometers apart, the proposals are mutually exclusive. Channel 241C2 could be allotted in compliance with the Commission's spacing requirements to Eupora with a site restriction 18.1 kilometers east or to Columbus with a site restriction 23.5 kilometers west.

3. In their joint comments, Radio Columbus and Sis Sound continue to support the substitution of Channels at Columbus. According to Radio Columbus the deletion of Channel 276A at Columbus will facilitate Sis Sound's application for full Class C facilities for WZBQ-FM, Channel 273C1, Jasper, Alabama, by eliminating a seven mile short spacing between Channel 276A at Columbus and Channel 273C at Jasper. Further, according to Radio Columbus, its comparison of the Columbus and Eupora upgrade proposals under the criteria established in the *Report and Order* in MM Docket 86-29 (Greenup, Kentucky and Athens, Ohio), shows that approximately 7,000 more people would gain a new aural service should Station WMBC, Columbus, be modified to operate on Channel 241C2. Radio Columbus states that it is aware of a counterproposal submitted by Tri County Broadcasting to substitute Channel 276C2 for Channel 276A at Columbus which appears to offer a solution whereby both Columbus and Eupora could obtain wide-area coverage channels. Radio Columbus states it would support this counterproposal should the Commission find it feasible.

4. Tri County Broadcasting, licensee of Station WEXA(FM), Eupora, Mississippi, Radio Columbus, Inc., licensee of Station WMBC(FM), Columbus, Mississippi, and Rego Broadcasting Company, licensee of Station WVRT(FM), Reform, Alabama, filed a joint counterproposal with the intention of resolving the conflicting proposals. The counterproposal proposes to substitute Channel 241C2 for Channel 269A at Eupora, substitute Channel 276C2 for Channel 276A at Columbus, and substitute Channel 269C2 for Channel 269A at Reform, Alabama. The counterproposal requires the substitution of Channel 236A for Channel 276A at Marion, Mississippi, and modification of the license of Station WQIC(FM), to specify operation thereon. Tri County, Radio Columbus and Rego are aware of the Commission's general policy requiring reimbursement to a station whose channel is being changed and all parties to the counterproposal have agreed to reimburse Station WQIC(FM) for all reasonable costs involved in changing channels.

5. Marion Broadcasting Company filed reply comments fully supporting the joint comments filed by Radio Columbus and Sis Sound, proposing Channel 241C2 be allotted to Columbus rather than Eupora, as that would allow the grant of Marion's proposal to substitute Channel 277C2 for Channel 276A at Marion, Mississippi.[4] However, Marion states its opposition to the substitution of Channel 236A for Channel 276A at Marion as advanced in the comments and counterproposal. Marion Broadcasting argues that such a switch would result in a loss of listeners and advertisers. However, Marion Broadcasting did state that it would accept the substitution of Channel 236C2 for Channel 276A to accommodate the other parties in this proceeding and would not oppose the other channel changes set forth in the counterproposal for Stations WMBC(FM), WEXA(FM) and WVRT(FM).

6. Tri County, in reply comments, continues to support the allotment of Channel 241C2 to Eupora, but also indicates support for the joint counterproposal which shows that upgrades can be accomplished at Eupora, Columbus and Marion, Mississippi and Reform, Alabama.

7. Marion Broadcasting Company, Inc. filed a petition on October 13, 1987, to upgrade its present facility from Channel 276A to Channel 277C2. Marion Broadcasting's petition to substitute Channel 277C2 for Channel 276A at Marion would have prevented the adjacent channel upgrade at Columbus suggested in the counterproposal but, Marion Broadcasting has since withdrawn that petition. In comments, Marion Broadcasting indicated it would not stand in the way of the proposed upgrades provided it too could upgrade. However, Marion Broadcasting has now agreed to its license being modified to Channel 236A and has filed a petition for special relief requesting that a Notice of Proposed Rule Making be issued proposing the

further modification of its license from Channel 236A to Channel 236C2.[5] In view of the fact that all of the parties to this proceeding have agreed to the substitution of the various channels and such substitutions can .be accomplished in compliance with the Commission's spacing requirements, no further analysis is necessary.

8. Based on the above information, we believe the public interest would be served by the substitution of Channel 241C2 for Channel 269A at Eupora, Mississippi and modification of the license for Station WEXA(FM) to specify operation on Channel 241C2. Channel 241C2 can be allotted to Eupora in compliance with the spacing requirements provided there is a site restriction 18.1 kilometers (11.2 miles) east to prevent a conflict with Station WSLI-FM, Channel 242C, Jackson, Mississippi and Station WONA-FM, Channel 244A, Winona, Mississippi. We shall also substitute Channel 276C2 for Channel 276A at Columbus, Mississippi, with a site restriction 10.6 kilometers (6.6 miles) east. The site restriction will prevent a short spacing to an application filed by Station WZBQ-FM, Channel 273, Jasper, Alabama, to upgrade to a full Class C facility (BPH 870302OT). To accommodate Channel 276C2 at Columbus it is necessary to substitute Channel 236A for Channel 276A at Marion, Mississippi. The substitution can be accomplished at the existing site for Station WQIC-FM, Marion. In response to the counterproposal filed jointly by Tri County, Radio Columbus and Rego, we shall also substitute Channel 269C2 for Channel 269A at Reform, Alabama, and modify the license of Station WVRT-FM to reflect the new channel. Channel 269C2 can be substituted for Channel 269A at Reform in compliance with the Commission's spacing requirements provided Channel 269A is deleted from Eupora, Mississippi.[6] We have authorized modification of the license of the above-mentioned stations in accordance with Section 1.420(g) of the Commission's Rules.

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 5, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Columbus, Mississippi	235C2, 276C2, 280A
Eupora, Mississippi	241C2
Marion, Mississippi	236A
Reform, Alabama	269C2

10. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the license of Station WMBC, Columbus, Mississippi, IS MODIFIED, to specify operation on Channel 276C2, in lieu of Channel 276A subject to the following conditions:

(a) Within 90 days of the effective date of this *Report and Order*, the licensee shall submit to the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

11. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the license of Station WEXA-FM, Eupora, Mississippi, IS MODIFIED, to specify operation on Channel 241C2, in lieu of Channel 269A subject to the following conditions:

(a) Within 90 days of the effective date of this *Report and Order*, the licensee shall submit to the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

12. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the license of Station WVRT-FM, Reform, Alabama, IS MODIFIED, to specify operation on Channel 269C2, in lieu of Channel 269A subject to the following conditions:

(a) Within 90 days of the effective date of this *Report and Order*, the licensee shall submit to the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

13. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the License of Station WQIC-FM, Marion, Mississippi, IS MODIFIED, to specify operation on Channel 236A subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BLH 870414KN except the channel as specified above. Any changes,

except those specified require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH 870414KN, except for the channel as specified above, and a license application (Form 302) is filed within 10 days of commencement of program tests.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communitiesof Marion, Mississippi and Reform, Alabama have been added to the caption.

[2] Public Notice of the counterproposal was given on May 26, 1988, Report No. 1731 (RM-6386).

[3] Charisma Broadcasting Company filed comments of interest during the reply comment period. Because they were untimely, Charisma's expression of interest have not been accepted in this proceeding. Radio Columbus and Sis Sound filed a Motion to Strike untimely expression of interest, and an Opposition to Motion to Strike was filed by Charisma Broadcasting Company.

[4] Marion Broadcasting Company, Inc. filed a petition on October 13, 1987, to upgrade its present facility from Ch. 276A to Ch. 277C2.

[5] As requested by Marion Broadcasting Company, a Notice of Proposed Rule Making will be issued as soon as its existing license is modified to specify operation on Channel 236A in lieu of Channel 276A.

[6] The coordinates used for Ch. 241C2 at Eupora are 33-31-20 and 89-64-30. The coordinates for Channel 276C2 at Columbus are 33-29-48 and 88-31-50. the coordinates for Channel 236A at Marion are 32-26-08 and 88-36-24. The coordinates for Channel 269C2 at Reform, Alabama are 33-10-32 and 87-59-39.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

LAND O'LAKES BROADCASTING WTRJ (AM) Troy, Ohio	**MM Docket No. 84-481** File No. BP-820720AK
Vernon H. Baker d/b/a POINT PLEASANT BROADCASTING COMPANY Point Pleasant, West Virginia	**MM DOCKET NO. 84-487** File No. BP-821122AD
Edward A. Baker d/b/a UNION CITY RADIO Union City, Indiana	**MM DOCKET NO. 84-489** File No. BP-821122AG

For Construction Permit

ORDER

Adopted: October 4, 1988; Released: October 19, 1988

By the Commission:

1. We have before us the "Comments" of Vernon H. Baker d/b/a Point Pleasant Broadcasting Company (Point Pleasant) filed on February 17, 1988 in response to an order by the Commission's General Counsel, FCC 88I-011 (Feb. 10, 1988). Point Pleasant requests that we issue a construction permit for a new AM station to serve Point Pleasant, West Virginia, as specified in its captioned application. No other party opposes the request.

2. The Commission designated Point Pleasant's application for hearing in this consolidated proceeding because it was mutually exclusive with the now-dismissed applications of Advanced Allied Communications Technologies, Inc. (Advanced Allied) and WPTW Radio, Inc. for permits to construct stations in Worthington, Ohio and Piqua, Ohio, respectively -- which, in turn, were mutually exclusive with the captioned applications of Land O'Lakes Broadcasting and Union City Radio. *Hearing Designation Order*, 49 Fed. Reg. 22531 (May 30, 1984). Point Pleasant's application is not mutually exclusive with either of the latter applications.

3. The Review Board dismissed WPTW Radio's application for failure to prosecute and held that the applications of Land O'Lakes, Union City Radio, and Point Pleasant were each to be preferred under 47 U.S.C. § 307(b) over that of Advanced Allied; that Land O'Lakes' proposal was superior on section 307(b) grounds to that of Union City Radio; and hence that it would serve the public interest to grant the applications of Point Pleasant and Land O'Lakes and deny those of Advanced Allied and Union City Radio. 103 FCC 2d 759 (Rev. Bd. 1986), rev. denied, 2 FCC Rcd 39 (1987). Advanced Allied and Union City Radio filed appeals with the United States Court of Appeals for the District of Columbia. No. 87-1018 (Jan. 14, 1987).

4. Ruling on the appeal of Union City Radio, the court held that the Commission had erred in denying review of the Review Board's determination that it would better serve the public interest to grant Land O'Lakes' application than to grant Union City Radio's and remanded the case to the Commission for further consideration. *Baker v. FCC*, 834 F.2d 181 (D.C. Cir. 1987). Land O'Lakes and Union City have filed pleadings in which they debate the merits of the section 307(b) issue that their competing applications pose, which will be resolved in a separate order.

5. Point Pleasant points out in its comments that the Court of Appeals had previously remanded the application of Advanced Allied to the Commission for consideration of a settlement agreement between Advanced Allied and Point Pleasant and that the General Counsel thereafter approved the settlement agreement and dismissed Advanced Allied's application. Order of the General Counsel, FCC 87I-124 (Dec. 22, 1987). Therefore, Point Pleasant asserts, no impediment remains to prevent the Commission from issuing the permit for which it has applied.

6. We agree that, in view of the dismissal of Advanced Allied's application, there is no point in withholding issuance of a permit to Point Pleasant pending final resolution of the controversy concerning the other two remaining applications, neither of which is in conflict with Point Pleasant's application. The public interest will be best served by expediting the institution of new broadcast service for Point Pleasant and the surrounding area.

7. ACCORDINGLY, IT IS ORDERED, That the application of Vernon H. Baker d/b/a Point Pleasant Broadcasting Company for authority to construct a new AM broadcast station at Point Pleasant, West Virginia, File No. BP-821122AD, IS GRANTED and that said application IS SEVERED from this proceeding.

8. IT IS FURTHER ORDERED, That proceedings concerning Docket No. 84-487 ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-170

In re Applications of

OMAHA CHANNEL 54 BROADCASTING GROUP, LIMITED PARTNERSHIP — File No. BPCT-840921LG

OMAHA TELECASTERS, INC. — File No. BPCT-850108KO

Construction Permit for a New Television Station
Omaha, Nebraska

ORDER

Adopted: October 4, 1988; Released: October 19, 1988

By the Commission:

1. The Commission has before it: (a) an Application for Review of a Review Board decision, 3 FCC Rcd 870 (1988), filed March 28, 1988 by Omaha Channel 54 Broadcasting Group, Limited Partnership; and (b) an Opposition thereto filed April 12, 1988 by Omaha Telecasters, Inc.

2. IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(g) the above-mentioned Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

HAMPSHIRE COUNTY BROADCASTING CO., INC. Amherst, Massachusetts	**BC Docket No. 81-159** File No. BPH-9176
AMHERST BROADCASTING, INC. Amherst, Massachusetts	**BC Docket No. 81-160** File No. BPH-9566

For Construction Permit
for a New FM Station

MEMORANDUM OPINION AND ORDER

Adopted: October 5, 1988; Released: October 19, 1988

By the Commission:

1. Now before the Commission are the above-captioned applications for authority to construct a new Class A FM station at Amherst, Massachusetts. On April 11, 1984, Chief Administrative Law Judge Thomas B. Fitzpatrick released an initial decison that granted Hampshire's application and denied Amherst Broadcasting's application, primarily because of Hampshire's substantial diversification preference. 99 FCC 2d 608 (Admin. L.J. 1984). The Review Board subsequently affirmed the grant to Hampshire. 99 FCC 2d 600 (Rev. Bd. 1984), recon. denied, 100 FCC 2d 245 (Rev. Bd. 1985). The Commission affirmed the Review Board without comment. FCC 86-100 (Mar. 30, 1986), recon. denied, 2 FCC Rcd 198 (1987).

2. Amherst Broadcasting appealed the grant of Hampshire's application to the United States Court of Appeals for the District of Columbia Circuit. *Amherst Broadcasting, Inc. v. FCC*, No. 87-1066 (D.C. Cir. filed Feb. 9, 1987). In the course of filing its brief in this case, the Commission's staff discovered that in November 1985 Hampshire had acquired an AM station in Brockton, Massachusetts. Because the Commission was unaware of this acquisition when it affirmed the Board's decision, and because the potential impact of that acquisition on Hampshire's substantial diversification preference had not been evaluated, the Commission requested the court to remand the proceeding. The court granted that request. No. 87-1066 (Nov. 19,1987).

3. Thereafter, the Office of General Counsel requested comments of the parties concerning the acquisition of Hampshire's Brockton station on the diversification criterion, on the resolution of the standard comparative issue, and on Hampshire's basic qualifications. FCC 87I-115 (Dec. 2, 1987).

4. Before us now are: (1) Letter filed September 30, 1987 by Hampshire submitting an amendment to its application; (2) Petition for Leave to Amend Application filed by Hampshire on November 24, 1987; (3) Motion to Make Application More Definite and Certain filed by Amherst Broadcasting on December 2, 1987; (4) Opposition to Petition for Leave to Amend Application filed by Amherst Broadcasting on December 4, 1987; (5) Conditional Petition to Reopen Record and Add Issues filed by Amherst Broadcasting on December 8, 1987; (6) Opposition to Motion to Make Application More Definite and Certain filed by Hampshire on December 11, 1987; (7) Opposition to Conditional Petition to Reopen Record and Add Issues filed by Hampshire on December 18, 1987; (8) Comments filed by Amherst Broadcasting on January 6, 1988; (9) Comments filed by Hampshire on January 6, 1988; (10) Supplement to Comments filed by Hampshire on January 7, 1988; (11) Reply filed by Amherst Broadcasting on January 19, 1988; and (12) Reply Comments filed by Hampshire on January 19, 1988.

5. Before discussing the decisional significance of the acquisition of the Brockton station by Hampshire, a preliminary matter must be resolved. On September 30, 1987, Hampshire filed an amendment to its application to report the grant of a construction permit to Edward F. Perry, Jr., a 50 percent shareholder in Hampshire, for a new Class II-D daytime only AM broadcast station at Easthampton, Massachusetts. The amendment was both timely and properly served on the parties to this proceeding pursuant to 47 C.F.R. § 1.65. Easthampton is less than 15 miles from Amherst. Included in the amendment is an agreement by Mr. Perry to divest any and all interest in the Easthampton station if Hampshire's grant in this proceeding becomes final. The amendment will be accepted for reporting purposes. In accordance with precedent, Mr. Perry's interest in the Easthampton station will not be attributed to Hampshire because of his timely divestiture commitment. *See Women's Broadcasting Coalition*, 59 RR 2d 730, 734 ¶ 13 (1986).

Diversification Criterion and Standard Comparative Issue

6. We have reviewed the comments and related pleadings filed herein and are convinced that all relevant facts are before us. Thus, no useful purpose would be served by remanding this case for further hearing. The law is well settled that for diversification comparison purposes, ownership interests in existing stations are most significant when located in the principal community proposed to be served, followed by those in the remainder of the service area, and then by those generally in the United States. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965). Amherst Broadcasting is the licensee of daytime only station WTTT, the only commercial broadcast facility in Amherst. 99 FCC 2d at 673 ¶ 34. Hampshire has no media interests – although Edward F. Perry, a 50 percent owner of Hampshire, has controlling interests in the permittee or licensee of stations WRTT in Vernon, Connecticut; WGFP in Webster, Massachusetts; and WATD-FM in Marshfield, Massachusetts. Mr. Perry is also a director of the permittee of station WDBY-FM in Duxberry, Massachusetts, a non-commercial station; has an option to purchase a 32 percent interest in the permittee of station WVFR in Richfield, Connecticut; and has a right of first refusal with respect to station WFHL(FM) in Falmouth, Massachusetts.

7. The Board recognized that a substantial concentration of control might diminish the substantial diversification preference usually awarded where a local monopoly would be created by licensing the same person to operate both

the AM and the FM stations in the community. *See Multiplex Communications, Inc.*, 95 FCC 2d 406, 408 ¶ 5 (Rev. Bd. 1983). Nonetheless, the Board held that, because Hampshire's attributable media interests were outside the service area, and, in fact, two of those interests were in another state, there was no showing of such a regional concentration of control. 99 FCC 2d at 604 ¶ 12.

8. In spite of this determination by the Board, Amherst Broadcasting devotes substantial portions of its comments to arguments -- previously made to the ALJ, the Board, and the Commission -- pertaining to the applicability of *Bill Garrett Broadcasting*, 16 FCC 2d 415 (1969), in which the Commission found a regional concentration of control to exist. The Board distinguished that case from the present situation on its facts. 99 FCC 2d at 604 ¶ 13. There is nothing before us to persuade us that the Board's holding has been vitiated. The only appropriate question before us at this time is whether the addition of the Brockton station to the other media interests of Hampshire would diminish or negate the substantial preference for diversification that was awarded to that applicant. We think not. Brockton is 80 miles away from Amherst and there is no overlap of the Brockton and Amherst service contours. The ALJ's holding, affirmed by the Board, remains true: "No broadcast company in which Perry [a 50 percent owner of Hampshire] has any ownership interest serves Amherst, Massachusetts or any area proposed to be served by Hampshire." I.D., 99 FCC 2d at 648 ¶ 153. *See* also, R.B., 99 FCC 2d at 604 ¶ 12. It is our opinion, based upon the record before us, that Hampshire's addition of the Brockton station does not require any modification of the previous holdings on the diversification criterion or the standard comparative issue.

Basic Qualifications -- Section 1. 65 Reporting Violation

9. An applicant in a comparative proceeding must notify the Commission in writing, within 30 days, of any change in the information contained in its application that may be of decisional significance. 47 C.F.R. § 1.65. The statement submitted to the Commission must be served on all parties to the proceeding. *Id.* Such statements must be filed "until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court." *Id.*

10. Pursuant to section 1.65, Hampshire should have amended its application to report the acquisition of the Brockton station and served copies of the amendment on all the parties to this proceeding. However, because the Commission has abolished its former practice of imposing comparative demerits based on character deficiencies, a reporting violation would be relevant only if it were disqualifying. *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1230-32 ¶¶ 110-13 (1986), recon. denied, 1 FCC Rcd 421 (1986). For a reporting violation to be disqualifying, there must be a showing of an intent to conceal the information. *See Radio Station WABZ*, 51 RR 2d 37, 44 ¶ 23 (1982).

11. By affidavit, Mr. Perry states that he did not realize that service on the other parties was required after completion of the hearing stage in this proceeding. Hampshire Comments, Exhibit 1. Nevertheless, Mr. Perry states that notice of the acquisition of the Brockton station was timely filed with the Commission on November 19, 1985. *Id.* Mr. Perry sent four separate letters containing this information in triplicate, in a single envelope, to the Commission. *Id.* One of the four letters was captioned "Re Application BPH - 9176 by Hampshire County Broadcasting, Inc. Requesting Channel 265A at Amherst, Massachusetts." *Id.* Moreover, on October 1, 1986, Mr. Perry "mailed to the Commission similar letters with a one page enclosure, all in triplicate, and all in a single envelope." *Id.*

12. The only copy of the November 19, 1985 letter found in the Commission's files was referenced "re Radio Station WRTT AM, Vernon, Connecticut," but filed in the WATD-FM Marshfield, Massachusetts ownership file. Appropriate copies of the October 1, 1986 letter were found in the Easthampton, Massachusetts file and the WATD-FM ownership files, but not in the docket file in this proceeding. Although the parties to this proceeding were not served with the November 19, 1985 notice of the acquisition of the Brockton station, and a copy of the letter cannot be found in this proceeding's docket file, copies of the letter are on file with the Commission. Moreover, the Brockton acquisition was reported again in the October 1, 1986 letter. Although Hampshire did not meet the specific requirements of section 1.65, in light of its disclosure of the pertinent facts in other documents it submitted to the Commission, there is no basis to conclude that Hampshire intended to conceal the information. *See Jersey Cape Broadcasting*, 85 FCC 2d 654, 668 ¶ 23 (1981); see also *David B. Jordan*, 51 FCC 2d 940, 940 ¶ 2 (Rev. Bd. 1975).

CONCLUSION

13. On the basis of the facts before us, the addition of the Brockton, Massachusetts station to Hampshire's ownership interests is not decisionally significant to resolving this case. In resolving diversity questions, the Commission deems ownership interests in existing stations to be most significant when located in the proposed community of service, followed by those in the remainder of the service area, and then by those generally in the United States. *Policy Statement on Comparative Broadcast Hearings*. 1 FCC 2d at 394. Although a showing of regional concentration of control might offset any preference otherwise due an applicant, the addition of the Brockton station to Hampshire's other media interests does not constitute regional concentration of control. In our opinion, the addition of one station to the equation does not alter the fact that, on the record of this case, the public interest would be best served by the addition of another "voice" in Amherst. Furthermore, because Hampshire's failure to report the acquisition of the Brockton station was not based on an intent to conceal the information, it does not raise substantial and material question concerning Hampshire's qualifications to be a licensee.

ORDERS

14. ACCORDINGLY, IT IS ORDERED, That the Commission's Orders, FCC 86-100 (Mar. 30, 1986) and 2 FCC Rcd 198 (1987), upholding the Review Board's grant of Hampshire County Broadcasting Co. Inc.'s application ARE REAFFIRMED.

15. IT IS FURTHER ORDERED, That the Petition for Leave to Amend Application filed by Hampshire County Broadcasting Co., Inc. on November 24, 1987 IS GRANTED and the amendment IS ACCEPTED.

16. IT IS FURTHER ORDERED, That the Motion to Make Application More Definite and Certain filed by Amherst Broadcasting, Inc. on December 2, 1987 and the Conditional Petition to Reopen Record and Add Issues filed by Amherst Broadcasting, Inc. on December 8, 1987 ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HARTFORD FIRE AND
INSURANCE COMPANY
Complainant,

v. File No. E-87-46

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

ORDER

Adopted: October 7, 1988; Released: October 19, 1988

By the Chief, Enforcement Division, Common Carrier Bureau:

1. We have before us a Joint Motion filed on August 31, 1988, by Hartford Fire Insurance Company (Hartford) and American Telephone and Telegraph Company (AT&T), requesting that we dismiss with prejudice the above-captioned proceeding and authorize the parties' agreement to settle all issues raised in the matter. For the reasons set forth below, the Joint Motion is granted.

2. This proceeding was initiated by a formal complaint filed by Hartford against AT&T on March 25, 1987, alleging that AT&T's rates for 56 kilobits per second (kbps) Data Digital Service (DDS) were unjust and unreasonable within the meaning of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). AT&T denied such allegations and moved to dismiss the complaint. On April 13, 1988, the Common Carrier Bureau (Bureau) released an order in the proceeding in which it granted AT&T's motion to dismiss in part and denied it in part. *Aetna Life Insurance Company et al. v. AT&T*, DA-88-462 (released April 13, 1988). On May 16, 1988, Hartford filed an Application for Review of the Bureau's order. Subsequently, the parties entered into settlement negotiations with the cooperation of the Enforcement Division. As a result of these negotiations, the parties reached a settlement that resolves all matters in controversy.

3. Hartford and AT&T represent that their agreement resolves all claims alleged in the complaint in a manner acceptable to both parties. The parties state that grant of their joint motion will terminate the proceeding in a manner satisfactory to both, and conserve the time and resources of the parties and the Commission.

4. On the basis of the statements contained in the parties' motion, we conclude that there are no longer issues in controversy and the proceeding should be terminated.

5. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Authorize Settlement and Dismiss Complaint filed by Hartford Fire Insurance Company and American Telephone and Telegraph Company IS GRANTED.

6. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Russell H. Carpenter, Jr., Esq.
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044

Re: (1) Non-wireline cellular radio MSA markets 190, 193, 198, 199, 201, 202, 203, 205, 207, 217, 221 and 232

(2) Non-wireline cellular radio MSA markets 248, 252, 256, 271, 276, 277, 278, 280, 295 (CC Docket No. 88-278)

Adopted: October 6, 1988; Released: October 6, 1988

Dear Mr. Carpenter:

This letter responds to your Petition for Reconsideration (Petition), filed September 15, 1988, regarding the Public Notice, Mimeo No. 4114, August 15, 1988, issued by this office in connection with the above-captioned proceedings. For the reasons set forth below and after consultation with the Office of General Counsel, your Petition is granted in part and denied in part.

BACKGROUND

As set forth in an August 9, 1988 Memorandum to the Managing Director from the Chairman's Chief of Staff, on July 14, 1988, the Chief of Staff met with Jonathan D. Blake, attorney for Schelle, Warner, Murray & Thomas, Inc. and affiliated companies, and Wayne D. Schelle, a principal thereof (hereinafter collectively referred to as Schelle). Schelle set forth its efforts for settling various cellular radio markets in a general manner, not related to any specific cellular radio markets or applicants. Upon request of the Chief of Staff, Schelle submitted a memorandum, subsequently resubmitted with corrections (the Schelle Memorandum) regarding these settlement efforts. In the cover letter transmitting the Schelle Memorandum, counsel for Schelle stated that because the oral conversation "did not refer to any specific markets or any specific applicants," Schelle did "not believe this letter needs to be served on anybody who may be considered interested persons with respect to the particular applications." The enclosed Schelle Memorandum did, however, describe, although not by name, the two sets of cellular radio proceedings referenced above (the so-called "Crossville" and "Lewis" proceedings).[1]

The Schelle Memorandum (at 3-4) also indicated, *inter alia*, that, under the proposed settlements, (a) various pleadings or applications might be dismissed, (b) Schelle "might have a minority (but non-controlling) ownership interest in the winning application, with an option to purchase a controlling interest," and (c) "both the first place and fourth place finishers (and perhaps others) would receive payments" from Schelle. The Schelle Memorandum set forth the reasons why Schelle believed such settlements would "comply with Commission requirements." *Id.* at 5. It is unclear from the Schelle Memorandum whether the settlement agreements would include all relevant applicants, or whether some parties would remain as potential objectors to the agreements. *See id.* at 3. Pursuant to 47 C.F.R. § 1.1212(f), the August 15 Public Notice classified these oral and written presentations to the Chief of Staff as prohibited presentations under the *ex parte* rules and provided notice to the parties. In its Petition, Schelle seeks reconsideration of the August 15 Public Notice.

DISCUSSION

Both the Crossville and Lewis proceedings became restricted upon public notice of the filing of mutually exclusive applications. 47 C.F.R. § 1.1208(c)(1). The proceedings remain restricted, and *ex parte* presentations remain prohibited, until they have "been decided or a settlement or agreement by the parties has been approved by the Commission and such decision or approval is no longer subject to reconsideration by the Commission or to review by any court." *Id.*, § 1.1208(a).

Contrary to your suggestion (Petition at 6-7), the suspension of the *ex parte* rules for the Crossville investigation did not permit all otherwise prohibited *ex parte* presentations. The Commission's suspension of the *ex parte* rules was limited to "responses, presentations, and communications made to the Commission *in connection with this investigation* . . . ." Public Notice, 2 FCC Rcd 3958 (1987), *reconsideration denied sub nom. John M. Roberts*, 3 FCC Rcd 371 (1988) (emphasis added), *petition for review dismissed sub nom. McLang Co. v. FCC*, No. 88-1192 (D.C. Cir. July 29, 1988). Although the Public Notice and the order affirming it may be somewhat ambiguous and it may be possible to interpret the Commission's suspension of the *ex parte* rules to apply to all presentations related to the merits of the applications involved in the Crossville proceeding rather than just those presentations relating to the investigation, that interpretation is not correct. Accordingly, to the extent Schelle's presentations related to the merits or outcome of the applications in the Crossville (as well as Lewis) proceedings, an issue which is discussed below, they constituted prohibited presentations under the *ex parte* rules.[2] Moreover, given that counsel for Schelle's cover letter transmitting the Schelle Memorandum suggested that the oral conversation would have been prohibited in both the Crossville and Lewis proceedings had specific markets been referenced, it is difficult for Schelle now to rely on a different understanding of the status of the Crossville proceeding under the *ex parte* rules.

To constitute a prohibited *ex parte* presentation, a presentation must be "directed to the merits or outcome of a proceeding." 47 C.F.R. § 1.1202(a). With respect to Schelle's oral conversation with the Chief of Staff, we conclude that it did not constitute an *ex parte* presentation because it involved general issues of Commission policy and not the merits or outcome of any specific proceedings. Had the Schelle Memorandum not described the Cross-

ville and Lewis proceedings, we would reach the same conclusion with respect to that presentation as well. Because, however, the Schelle Memorandum did present sufficient facts to permit identification of the proceedings, we conclude, for the reasons discussed below, that the Schelle Memorandum was a prohibited presentation. [3] We wish to stress, however, that the question of whether the Schelle Memorandum violated the *ex parte* rules is a close one. We could have reasonably decided that there was no violation. Because, however, we are dealing with rules that seek to safeguard the integrity of our processess and the rights of others, we routinely attempt to decide *ex parte* cases conservatively. Accordingly, we found that the Schelle Memorandum did constitute a prohibited presentation, and our review on reconsideration persuades us that our decision should stand.[4] The ultimate issue in these proceedings is who should receive the non-wireline cellular authorization for the markets involved.[5] Under Schelle's settlement proposals, pending applications in these restricted proceedings would have to be amended to reflect Schelle's newly-acquired minority interest. *See* 47 C.F.R. § 22.918(b). The Commission would also have to be notified that the dismissal of pending pleadings and applications related to a settlement agreement. 47 C.F.R. § 22.29. The Commission's review of the amended application could involve a determination by the Commission of whether Schelle's participation as a minority owner is in the public interest, as well as a review of the settlement agreement to determine whether other public interest questions are raised. As mentioned above, it is unclear whether the settlement agreements will be unanimously supported by all relevant parties; some applicants might have reasons to oppose them. Accordingly, we believe that the arguments in the Schelle Memorandum in support of Schelle's settlement proposals, and in particular its arguments that the settlements would "comply with Commission requirements," Schelle Memorandum at 4-5, are "directed to the merits or outcome" of both the Crossville and Lewis proceedings and constituted a prohibited *ex parte* presentation in both proceedings. *See* 47 C.F.R. § 1.1202(a).

In sum, we are granting reconsideration to the extent that we have decided that Schelle's oral conversation to the Chief of Staff was not a prohibited presentation under the *ex parte* rules and are denying reconsideration to the extent that we have decided that the Schelle Memorandum constituted a prohibited presentation in both the Crossville and Lewis proceedings.

Sincerely,

Edward J. Minkel
Managing Director

FOOTNOTES

[1] Specifically, the Schelle Memorandum stated: "In one set of the disputed cases we seek to settle, the processing of the tentative selectees' applications has been held up by the Commission's staff pending the outcome of a Justice Department investigation concerning *certain* aspects of their preparation. Some of the tentative selectees in this first set of markets have received letters from the Justice Department stating that they are not subject to criminal investigation unless they perjured themselves during the Grand Jury investigation. We believe that at least some of the others could obtain similar letters if they requested them. In a second set of markets the tentative selectees' applications have been designated for hearing on real- part-in-interest and related issues." Schelle Memorandum at 2 (emphasis in original).

[2] To the extent the August 15 Public Notice and the underlying materials were placed only in a public file associated with the Lewis proceeding and not the Crossville proceeding, Petition at 6, that was an oversight and will be corrected.

[3] We note again that Schelle's counsel's cover letter transmitting the Schelle Memorandum is consistent with this conclusion. If, as counsel suggests, the oral conversation was not prohibited because it did not refer to specific proceedings, the fact that the Schelle Memorandum did describe specific proceedings would appear to render the written presentation, without service on the appropriate parties, prohibited.

[4] We should make clear that the Public Notice listing the presentation as prohibited did not suggest that Schelle had intended to violate the rules. The record before us would suggest otherwise.

[5] Schelle's statements that the "subject of the Lewis proceeding is the qualifications of the tentative selectees" and that other applicants are at this point part of "as-yet unrestricted proceeding[s]," Petition at 8, 11, are wrong. All of the pending, mutually restricted applications are restricted now, and have been for some time. *See* 47 C.F.R. § 1.1208(c)(1). Accordingly, the presentations cannot be viewed as "equally related to a succession of unrestricted prospective proceedings" involving other applicants "in both the Lewis and Crossville markets." *See* Petition at 11. Similarly, in light of the descriptions of both the Crossvile and Lewis proceedings as the two "set[s]" of markets that Schelle seeks to settle, Schelle Memorandum at 2, the Schelle Memorandum, unlike the oral conversation, was not "essentially generic in nature." *See* Petition at 14.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

JHP PARTNERSHIP,
Complainant,

v. File No. E-88-78

MANCHESTER NECMA
LIMITED PARTNERSHIP

and

CONTEL CELLULAR, INC.,
Defendants.

ORDER

Adopted: October 7, 1988; Released: Ocotber 19, 1988

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On June 23, 1988, JHP Partnership (JHP) filed a complaint with the Commission, alleging that the defendants' refusal to extend the terms of their cellular service resale agreement with JHP violated Sections 201 and 202 of Communications Act, 47 U.S.C. §§ 201, 202, and the Commission's cellular resale policies. JHP requested that the Commission issue an order directing the defendants to continue to provide resale service pursuant to the agreement until the earlier of 60 days from the date the complaint was filed or the date on which the issues raised in the complaint were resolved.

2. On June 24, 1988, the Enforcement Division held a conference with the parties in an effort to facilitate a settlement of the matters in controversy. As a result of that conference, the parties agreed in principle to a mutually satisfactory resolution. Subsequently, on August 18, 1988, counsel for JHP submitted a letter to the Commission advising that the parties had finalized the terms of their settlement and further requesting that the complaint be dismissed.

3. On the basis of the statements contained in the letter, we conclude that there are no longer issues in controversy and the proceeding should be terminated.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the above-captioned complaint IS DISMISSED WITH PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

ILLINOIS SMSA LIMITED PARTNERSHIP — File No. 01542-CL-L-88

For a license to cover construction permit to operate on frequency Block B in the Domestic Public Cellular Radio Telecommunications Service to serve the Bloomington-Normal, Illinois Metropolitan Statistical Area

MEMORANDUM OPINION AND ORDER

Adopted: October 12, 1988; Released: October 19, 1988

By the Chief, Mobile Services Division:

1. Illinois SMSA Limited Partnership (ISLP) has filed an application for a radio station license to cover its construction permit to operate in the Domestic Public Cellular Radio Telecommunications Service on frequency Block B (wireline) in Bloomington-Normal, Illinois. Cellular of Bloomington-Normal, Inc. (CBN) has filed a petition to defer the issuance of the covering license. ISLP has filed an opposition to the petition. For the reasons set forth below, we will deny the petition and grant the application.

BACKGROUND AND CONTENTIONS

2. CBN requests that the Commission delay granting operating authority to ISLP for six months or until CBN is prepared to commence operations. CBN maintains that ISLP's headstart in the Bloomington-Normal Metropolitan Statistical Area (MSA) will result in anticompetitive service offerings because the Bloomington-Normal market "is a market with limited demand for cellular telephone service, as compared to the top MSAs."[1]

CBN states that it expects to commence operations within six months of the Commission's grant of a construction permit and argues that a prompt grant of operating authority to ISLP would result in a headstart period of "at least six months," during which ISLP would have a critical advantage in acquiring the "core of potential customers in Bloomington-Normal who are certain to subscribe to cellular service as soon as it becomes available." CBN notes that once these core customers are on line, it would be very difficult for a late entrant to convince customers to change to a new service, which could be "fatal to the second competitor." CBN further argues that a six months delay in ISLP's grant would not materially delay rapid inititiaton of cellular service in the Bloomington-Normal MSA, while the simultaneous commencement of operations by both licensees would afford potential subscribers a choice of service providers at the outset.

3. In its opposition, ISLP responds that CBN has failed to provide evidence that a wireline headstart would have a "demonstrable impact on competiton." ISLP also maintains that CBN has submitted no empirical or other market-specific evidence that a deferral of operating authority would be in the public interest. ISLP notes that *In re Sacramento Valley Limited Partnership*, 3 FCC Rcd 3755 (released June 17, 1988) (*Sacramento Valley Order*), the Mobile Services Division dismissed a similar petition for deferral of operating authority finding that the Petitioner's main argument, that the particular market possessed a limited demand for cellular service and may have been unable to support the entry of a second system, amounted to little more than "general unsupported allegations of harm," and was unacceptable under the *Cellular Report and Order*.[2] Lastly, ISLP points out that CBN can establish a presence in the Bloomington-Normal market promptly as a reseller and shift customers to its own service when it is ready to commence operations. After grant of its pending application for operating authority, ISLP states that it is prepared to offer cellular service for resale "under reasonable, non-discriminatory terms, subject to CBN's satisfactory compliance with ISLP's standard financial requirements."

DISCUSSION

4. The Commission has stated repeatedly that a party requesting deferral of wireline operating authority "[b]ears a heavy burden of demonstrating that such action would be in the public interest." *Cellular Report and Order*, *supra* at 492; *see also*, *Eau Claire Cellular Telephone Company*, 3 FCC Rcd 3081 (1988) at para. 4. The Commission has emphasized that it would defer action on a wireline application only "[w]here it can be demonstrated in a particular case that harm to the public will result from allowing the wireline carrier an early entry into the market involved." *Cellular Report and Order, on reconsideration*, 89 FCC 2d 75 at n.32. The Commission's goal for cellular radio is not to guarantee the economic well-being of any applicant or licensee, but rather to further the public interest in receiving reliable, economic service as soon as possible. *Cellular Report and Order*, *supra* at 74-75; see also, *United States Cellular Operating Company of Panama City, Florida*, DA 88-1283 (Mob. Serv. Div., released September 2, 1988). The fact that an applicant or licensee may suffer economic harm is not enought to warrant delaying the implementation of cellular service. *Eau Claire*, *supra* at para. 5.

5. Based on a review of its petition to defer, we find that CBN has failed to satisfy its heavy burden of demonstrating that early wireline entry will so jeopardize the development of a competitive market in the Bloomington-Normal, Illinois MSA as to be contrary to the public interest. CBN has not presented any statistical, market-specific data or other evidence of any anticompetitive effects that ISLP's entry now will be detrimental to the public.

6. Accordingly, IT IS ORDERED, That the application of Illinois SMSA Limited Partnership, for a covering license, File No. 01542-CL-L-88, is GRANTED.

7. IT IS FURTHER ORDERED, That the Petition to Defer filed by Cellular of Bloomington-Normal, Inc. is DENIED.

8. This order is issued under Section 0.291 and Section 1.108 of the Commission's rules and is effective on its adoption date. Petitions for reconsideration under Section 1.106 and applications for review under Section 1.115 may be filed within 30 days of the date of the public notice of this Order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Petitioner states in its pleadings that in a 1980 population census, the MSA had a population of only 119,141 persons, and is ranked 250th in size. No statistical studies of the market were appended.

[2] *Cellular Communications Systems*, 86 FCC 2d 469, 490 (1981) *(Cellular Report and Order), on reconsideration*, 89 FCC 2d 58 (1982) *(Reconsideration Order), on further reconsideration*, 90 FCC 2d 571 (1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

THE PUBLIC TELEPHONE COUNCIL

Petition for Declaratory Ruling
that Bell Operating Company Pay
Telephones are Customer Premises
Equipment for Regulatory Purposes

ORDER

Adopted: September 20, 1988 Released: September 22, 1988

By the Common Carrier Bureau:

1. Before the Bureau is a motion by GTE Service Corporation and its affiliated domestic telephone operating companies (GTE) for an extension of time in which to file reply comments in the above-captioned Petition for Declaratory Ruling of The Public Telephone Council (PTC). Public Notice number DA 88-1200 released on August 9, 1988, permitted comments to be filed within thirty days after the date of the Notice, and reply comments within fifteen days thereafter. Therefore, the final comment date was September 9, and the reply comment deadline September 26, 1988, pursuant to the method of calculation prescribed by Rule Section 1.4, 47 C.F.R. § 1.4, as amended December 7, 1987.

2. The petition of PTC, which elicited twenty-one comments in response to the Public Notice,[1] involves the issue of whether all Bell Operating Company pay telephones should continue to be excluded from the Customer Premises Equipment category under the Commission's regulatory policies. GTE pleads that the fifteen day reply comment period does not permit sufficient time to obtain, analyze, and prepare replies. While it is Commission policy not to grant extensions of time routinely, we believe that the extensive number of comments filed and complex issues raised by them warrant two weeks additional time for the replies. PTC has informally advised Commission staff that it does not oppose the two-week extension.

3. Therefore, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that an extension of two weeks time in which to file reply comments in this matter is granted. ACCORDINGLY, the reply comment date is exended from September 26 to October 11, 1988.

FEDERAL COMMUNICATIONS COMMISSION

James M. Talens
(for) James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] In addition, BellSouth filed an objection and motion to dismiss PTC's petition, and PTC filed its reply, prior to issuance of the Notice.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

UNITED STATES CELLULAR CORPORATION — File No. 95633-CL-P-299-A-86

For authority to construct and operate a Domestic Public Cellular Radio Service on Frequency Block A in the Casper, Wyoming Metropolitan Statistical Area (MSA)

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 1988; Released October 13, 1988

By the Chief, Mobile Services Division:

1. United States Cellular Corporation (USCC) and Ronald F. Trinchitella (Trinchitella) both filed applications for the Casper, Wyoming MSA. Trinchitella's application was selected first in the lottery and USCC's application was selected second. By a letter dated March 3, 1987, the Mobile Services Division (MSD) dismissed Trinchitella's application as defective because the Form 401 was not personally signed by Trinchitella. On reconsideration, the Common Carrier Bureau (Bureau) upheld the MSD's decision. *Ronald F. Trinchitella*, 3 FCC Rcd 343 (Com. Car. Bur. 1988). Trinchitella has filed an application for Commission review of the Bureau's decision, which is currently pending. Trinchitella also filed a petition to dismiss or deny USCC's captioned application. USCC has filed a reply.

2. Trinchitella asks that we deny USCC's application or, at a minimum, defer action on the application until after the Commission rules on Trinchitella's application for review. Trinchitella argues that he has made a strong case for reversing the Bureau's order. He further states that grant of USCC's application would merely result in additional litigation if Trinchitella prevails and USCC's license has to be rescinded. Trinchitella states that under such circumstances, the result would be increased administrative burdens on the Commission and further delay in starting service to the public.

3. USCC responds that Trinchitella's petition does not challenge USCC's qualifications to be a cellular licensee and raises no grounds for denying USCC's application. USCC states that Trinchitella's "petition to deny" is really a request for a stay, and that Trinchitella has not justified his stay request. Finally, USCC asserts that further delay will give additional competitive advantage to the wireline system and that the public will be harmed by the lack of competition.

DISCUSSION

4. Pursuant to Section 1.102(b) of the Commission's rules, the Bureau's order became effective on the day it was released. *See Committee to Save WEAM v. F. C. C.*, 808 F2d 113, 119 (1986); *Houston Mobilfone, Inc.*, 33 Rad. Reg. (P&F) 1015, 1019 (1975). Furthermore, Trinchitella's pending application for Commission review does not stay the effect of the Bureau order. *See Weam*, 808 F2d at 119. Since Trinchitella's application has been dismissed, USCC is the new tentative selectee and, except for the petition to deny, USCC's application is ready for grant.

5. We find Trinchitella's pleading, although titled "petition to dismiss or deny", presents no grounds for denying USCC's application and is really a request for a stay so that USCC's application will not be granted until the Commission rules on Trinchitella's application for review. To obtain a stay, Trinchitella must show (1) a likelihood that he will prevail on the merits; (2) that he will suffer irreparable injury unless the stay is granted; (3) that a stay would not harm other interested parties; and (4) that the stay will be in the public interest. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F2 841 (D.C. Cir. 1977).

6. We find that Trinchitella has failed to meet the four part test since (1) his application has already been rejected by the MSD and the Bureau; (2) Trinchitella has not shown that he will suffer irreparable harm if the stay is not granted; (3) a stay may harm USCC by further increasing the wireline's competitive advantage; and (4) the stay would harm the public by delaying the start of non-wireline cellular service in Casper, Wyoming. Accordingly, we find that Trinchitella has not shown that that grant of USCC's application should be stayed.

ORDERING PARAGRAPHS

7. Accordingly, IT IS ORDERED that the application filed by United States Cellular Corporation, File No. 95633-CL-P-299-A-86, IS GRANTED, effective on the release of this order. Construction is not authorized at any location for which a final Federal Aviation Administration determination has not been submitted to the Commission, and any required marking and lighting specifications have not been issued by the Commission. The authorization does not include the right to any interference protection in any areas outside the Casper, Wyoming MSA and is conditioned on United States Cellular Corporation coordinating with current and future licenses in adjacent markets and upon providing interference-free operations to licensees in other areas.

8. IT IS FURTHER ORDERED that the petition to deny filed by Ronald F. Trinchitella IS DENIED.

9. IT IS FURTHER ORDERED that all non-wireline cellular applications in the Caspar Wyoming MSA, other than the application of United States Cellular Corporation, ARE HEREBY DISMISSED.

10. This order is issued under Section 0.291 of the Commission's rules and is effective on its release date. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order. *See* Section 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

Kevin J. Kelley
Chief, Mobile Services Division
Common Carrier Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 11, 1988

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PACIFIC' S COMPARABLY EFFICIENT INTERCONNECTION PLAN FOR VIDEOTEX GATEWAY SERVICE

On September 23, 1988, Pacific Bell and Nevada Bell (Pacific) filed a comparably efficient interconnection (CEI) plan to provide a videotex gateway service on an unseparated basis. According to Pacific, the videotex gateway service will allow customers to locate, select, access and interact with various enhanced service providers (ESPs) via a video screen. Pacific also requests that it be permitted to conduct a market trial of the videotex gateway service in order to gain further knowledge of the benefits, features and application of its service. Pacific states that the market trial would be limited to one year and that it would be conducted within the local access and transport area (LATA) that covers the San Francisco Greater Bay Area. Pacific intends to notify the Commission if any modifications or additions are made to the proposed service as a result of the market trial.

As required in the Computer III proceeding (*Phase I Order*, 104 FCC 2d 958 (1986), *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *further reconsideration*, 3 FCC Rcd 1135 (1988)), the Commission must approve the CEI plan before Pacific can begin implementing the proposed service.

According to Pacific, it will account for the joint and common costs of the videotex gateway service pursuant to its Part 32 cost allocation manual that the Commission has conditionally approved (Nevada Bell's and Pacific Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 287 (1988)). Pacific also describes its plans for complying with the other Computer III nonstructural safeguards governing the use of customer proprietary network information, nondiscrimination reporting and nondiscriminatory provisioning, and disclosure of network information.

Interested parties should file comments on this plan by *November 1, 1988*, and reply comments by *November 15, 1988*, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of Pacific's plan can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 13, 1988

REVISIONS TO THE AVERAGE SCHEDULES PROPOSED BY THE NATIONAL EXCHANGE CARRIER ASSOCIATION, INC.

On October 3, 1988, the National Exchange Carrier Association, Inc. (NECA) filed revisions to the interstate average schedules that, under NECA's proposal, would become effective January 1, 1989.

Under NECA's proposal the following average schedule formulas would be in effect during 1989:

(A.) Common Line Basic Formula.

(1) For access lines per exchange less than 385.55, the settlement per access line per month would be: 12.982078 - (.015532 x Access Lines Per Exchange).

(2) For access lines per exchange greater than or equal to 385.55, the settlement per access line per month would be6.993457.

(B.) *Traffic Sensitive Central Office.*

The settlement per minute per month would be.030216 (191.497493/Minutes Per Exchange).

(C.) *Intertoll Switching (B6).*

The settlement per month per trunk would be29.18.

(D) *Line Haul Switched Circuit Termination (Non - Distance Sensitive)*

The settlement per month would be34.05 per termination.

(E) *Line Haul Facility (Distance Sensitive).*

The settlement per month would be (1.165293 x Interstate Circuit Miles) + (0.001554 x TS Minutes per month).

(F) *Special Access.*

Settlement = .939959 x Revenues.

(G) *CABS & Administrative.*

Settlement =385.90 + (.000486 x TS Minutes).

NECA has also proposed a two year transition plan that NECA states would be applicable to companies that would be expected to experience reductions in settlements in excess of specified monthly amounts as a consequence of the revisions that NECA has proposed. According to NECA,

"[t]ransition payments would be determined by comparing individual company total settlements for the first nine months of 1988[1] to individual company total settlements computed using the 1988 demand volumes reported to NECA for the same period with the proposed 1989 formulas. Beginning with implementation of the schedules, monthly transition payments will be paid in an amount equal to this difference reduced progressively each month by the greater of (i) one-twelfth of the average settlement reduction per line experienced by average schedule companies as a whole or (ii) one twenty-fourth of the individual company's per line settlement reduction. In this manner, companies that are expected to experience smaller than average settlement reductions will complete the transition in less than one year. Companies with greater than average settlement reductions would require longer than one year to complete the transition.[2] All companies, however, would complete the transition within the specified two-year period (*i.e.*, 24 months after the schedules go into effect). [3]

In addition to a more detailed, and extended, discussion of NECA's proposed transition plan, NECA's filing contains information on the development of the proposed revisions, the data that were employed, and the adjustments that were made in response to earlier Commission directives.

Persons wishing to examine NECA's "1989 Modification of Average Schedules" filing may do so at Commission Reference Room 544, 1919 M Street, N.W., Washington, D.C. Copies of NECA's "1989 Modification of Average Schedules" filing may be purchased from International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800.

Because of the length and complexity of NECA's filing, we have decided to provide additional time for the preparation of comments and replies even though the reply comment date extends beyond the January 1, 1989 effective date that NECA has proposed. As a consequence, persons wishing to comment on NECA's proposed revisions to the average schedules, NECA's proposed transition plan, or any other aspect of NECA's filing, may do so by filing comments on or before *December 14, 1988* and reply comments, on or before *January 13, 1989*. Copies of each comment and reply comment should be filed in the following manner: (1) five (5) copies should be filed with the Secretary, Federal Communications Commission, 1919 M St., N. W., Washington, D.C. 20554; (2) three (3) copies should be filed with the Policy and Program Planning Division, Room 544, 1919 M St., N.W., Washington, D.C. 20554; (3) comments and replies should be captioned "In the Matter of Revisions to the Average Schedules proposed by NECA on October 3, 1988."

For further information contact Kent Nilsson, (202)-632-6363.

FEDERAL COMMUNICATIONS COMMMISSION

FOOTNOTES

[1] "Exclusive of Universal Service Fund (USF) settlements, ARPM Transition payments and non CABS and access administration supplemental disbursements such as the reimbursement for Part 32 implementation." *See* NECA's proposed "1989 Modification of Average Schedules" at I-22, n.15.

[2] NECA amplifies on its proposed transition by stating: "if the average per line settlement reduction is1.50, a company expected to experience a 1.00 per line reduction would complete the transition in 8 months (1.00 per line reduced each month by 1/12 of the average reduction of 1.50). A company expected to experience a per line reduction of1.75 would require 14 months to complete transition. Companies expected to experience settlement reductions greater than twice the average (*i.e.*, more than3.00 per line) would complete the transition in 24 months, with transition settlements reduced each month in equal 1/24 increments." *Id.* at n.16.

[3] *Id.* at I-22.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-111

In the Matter of

Amendment of Section 73.202(b), RM-5359
Table of Allotments,
FM Broadcast Stations.
(Vero Beach, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1988; Released: October 20, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Treasure Coast Broadcasting Company, Limited Partnership (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 1632 (1988), proposing the substitution of Channel 229C2 for Channel 228A at Vero Beach, Florida, and the modification of its license for Station WGYL(FM) to specify operation on the higher powered channel. Petitioner filed supporting comments. No other comments were received.

2. Channel 229C2 can be allotted to Vero Beach with a site restriction of 4.6 kilometers (2.9 miles) southwest.[1] We note that this site restriction does not negate the existing short-spacing to Station WSWM-FM, Channel 228A, Belle Glade, Florida. However, as stated in the *Notice*, the allotment will not increase the existing short-spacing between the two stations but will in fact reduce it by 0.5 kilometers (from 2.8 to 2.3 kilometers).

3. Based on the record before us, we believe the public interest would be served by substituting Channel 229C2 for Channel 228A at Vero Beach, Florida, since it could enable Station WGYL(FM) to expand its coverage area. As proposed, we shall also modify petitioner's license for Station WGYL(FM) to specify operation on the higher powered channel.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 5, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Vero Beach, Florida	229C2, 259C2, 269A, 279C2

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Treasure Coast Broadcasting Company, Limited Partnership, for Station WGYL(FM), Vero Beach, Florida, IS MODIFIED effective **December 5, 1988,** to specify operation on Channel 229C2 in lieu of Channel 228A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 27-36-04 and West Longitude 80-22-40.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-165

In the Matter of

Amendment of Section 73.202(b),	RM-5978
Table of Allotments,	RM-6198
FM Broadcast Stations.	RM-6425
(Sioux Center, Iowa, and Sioux Falls, South Dakota)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1988; Released: October 20, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 3 FCC Rcd 2242 (1988), which sought comments on the mutually exclusive requests of (1) Tri-State Broadcasters, Inc. (Tri-State), seeking the substitution of Channel 230C2 for Channel 232A at Sioux Center, Iowa, and the modification of its license for Station KVDB-FM to specify the higher powered channel and (2) the request of Vaughn Broadcasting Group (Vaughn), requesting the substitution of Channel 230C2 for Channel 228A at Sioux Falls, South Dakota, and the modification of its license for Station KKRC(FM) to specify the higher powered channel. Co-channel Class C2 allotments are required to be separated by at least 190 kilometers but Sioux Center and Sioux Falls are located only approximately 57 kilometers apart. Comments were filed by Tri-State and Vaughn. Vaughn also filed a counterproposal requesting the substitution of Channel 279C2 in lieu of the proposed Channel 230C2 at Sioux Falls, and the modification of its license accordingly.[1] Reply comments were filed by Tri-State.

2. Tri-State notes that Sioux Center, with a 1980 U.S. Census population of 4,588 persons, is located approximately midway between the larger communities of Sioux City, Iowa, and Sioux Falls, South Dakota. It goes on to state that Sioux Center is located in the midst of a large agricultural area with relatively low population density. Thus, it argues that a wide coverage area FM channel is needed in order to provide the station with an adequate financial base as well as to provide area residents with timely news and information concerning such matters as storms and school closings during the winter months and agricultural news and information during the summer months. As requested in the *Notice*, Tri-State provides a gain area showing indicating that the allotment of Channel 230C2 to Sioux Center would result in an increase of the station's 1 mV/m contour from 1847 square kilometers with 27,630 persons to 8593 square kilometers with 92,664 persons, resulting in a gain of 6746 kilometers and 65,034 persons. Tri-State further submits that the allotment of Channel 230C2 to Sioux Center would result in a second FM service to 311 persons in an area of 48.6 square kilometers, a third FM service to 265 persons in an area of 72.8 square kilometers, a fourth FM service to 3,046 persons in an area of 518 square kilometers, and a fifth FM service to 8,804 persons in an area of 843.3 square kilometers, thus providing service to significant areas which are currently underserved.

3. In further comparing the needs of Sioux Center and Sioux Falls, Tri-State points out that Sioux Falls already receives service from at least six existing local FM stations, three of which have Class C facilities, and that the proposed Class C2 facilities for Station KKRC(FM) would fall entirely within the 1 mV/m contours of two of these stations. Additionally, Tri-State submits that large portions of Station KKRC(FM)'s increased service area are served by the other four Sioux Falls FM stations and by the five AM stations licensed there. Thus, it argues that Vaughn's proposal would not result in any underserved population receiving new service but would merely duplicate already existing service.

4. Vaughn urges the upgrading of Station KKRC(FM) at Sioux Falls. In comparing the relative needs of Sioux Falls and Sioux Center, Vaughn states that the first three allotment criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), do not apply.[2] However, it believes that several factors appropriate to the fourth category weigh in favor of Sioux Falls. It states that Sioux Falls, with a 1980 population of 81,343 persons, is the largest city in South Dakota, and that the community has grown by 8,855 persons since the previous Census. On the other hand, Vaughn notes that Sioux Center, with a 1980 population of 4,588, ranks merely as the 78th largest community in Iowa, and that it increased by only 1,138 persons since the 1970 Census. Vaughn also contends that the allotment of a Class C2 channel to Sioux Falls would help equalize the marketplace by permitting Station KKRC(FM) to more effectively compete with its Class C competitors. Conversely, Station KVDB-FM at Sioux Center has no local competitor and thus Vaughn argues that the community can be adequately served with a Class A station. However, it believes that a comparison of the two communities may not be necessary. Further review has found that Channel 279C2 can be allotted to Sioux Falls in compliance with the Commission's technical requirements. Vaughn states that it will apply for Channel 279C2, if allotted.

5. Tri-State, in reply, argues that any competitive disadvantage which Station KKRC(FM) may experience is not a valid reason to allot the Class C2 channel to Sioux Falls over Sioux Center. It states that there were numerous high powered FM stations serving Sioux Falls when Vaughn acquired its Class A station in 1981. Thus, it believes that Vaughn must have been aware of the competitive situation prior to acquiring ownership of the station. Further, Tri-State contends that the competitive argument advanced by Vaughn concerns its private interests rather than the interest of the public. However, it supports Vaughn's counterproposal requesting the allotment of Channel 279C2 to Sioux Falls.

DISCUSSION

6. Based on the above information, we believe that the public interest would be served by granting Tri-State's proposal to substitute Channel 230C2 for Channel 228A at Sioux Center and Vaughn's counterproposal to substitute

Channel 279C2 for Channel 228A at Sioux Falls. We find that both Sioux Center and Sioux Falls could benefit from the allotment of higher powered Class C2 channels. While the Commission originally proposed an adjacent channel upgrade at Sioux Falls, thus denying interested parties an opportunity to express an interest in use of the Class C2 channel there, the Public Notice announcing the filing of Vaughn's counterproposal invited the filing of such interests and expressly stated that competing expressions of interest in use of Channel 279C2 would be accepted. However, no such expression of interest was received. Therefore, we find that the license of Vaughn Broadcasting Group for Station KKRC-FM can be modified herein to specify operation on non-adjacent Channel 279C2. [3] With this action, it is not necessary to comparatively consider the public interest benefits which would accrue from the allotment of a Class C2 channel to either Sioux Falls or Sioux Center.

7. Channel 230C2 can be allotted to Sioux Center, Iowa, in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.5 kilometers (3.4 miles) west. Channel 279C2 can be allotted to Sioux Falls, South Dakota, in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.1 kilometers (1.3 miles) east.[4] As proposed, we shall also modify the licenses of Tri-State Broadcasters, Inc. for Station KVDB-FM and Vaughn Broadcasting Group for Station KKRC(FM) to specify operation on Channels 230C2 and 279C2, respectively.

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 5, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Sioux Center, Iowa	230C2
Sioux Falls, South Dakota	223C, 243C, 247C1, 261A, 270C2, 279C2, 284C

9. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Tri-State Broadcasters, Inc. for Station KVDB-FM, Sioux Center, Iowa, IS MODIFIED effective December 5, 1988, to specify operation on Channel 230C2 in lieu of Channel 232A, and the license of Vaughn Broacasting Group for Station KKRC(FM), Sioux Falls, South Dakota, IS MODIFIED, effective **December 5, 1988,** to specify operation on Channel 279C2 in lieu of Channel 228A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Public Notice of the filing of this counterproposal was given on June 22, 1988, Report No. 1735.

[2] The priorities set forth therein are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. The second and third priorities are accorded equal weight.

[3] This action also obviates a conflict between Vaughn's proposed use of Channel 230C2 at Sioux Falls and the request of Dakota Broadcasting, Inc. to substitute Channel 229C2 for Channel 232A at Brookings, South Dakota MM Docket 88-72, 3 FCC Rcd 1016 (1988). The Brookings request was filed on October 21, 1987, and the Sioux Falls request was filed on December 15, 1987. However, the Commission inadvertently failed to enter the Brookings proposal in the data base and thus the conflict was not discovered until the record in this proceeding was reviewed.

[4] The coordinates for Sioux Center are North Latitude 43-04-00 and West Longitude 96-14-30. The coordinates for Sioux Falls are North Latitude 43-32-52 and West Longitude 96-42-33.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-99

In the Matter of

Amendment of Section 73.202(b), RM-6074
Table of Allotments,
FM Broadcast Stations.
(Cornelia and Chatsworth, Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1988; Released: October 20, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Habersham Broadcasting Company (petitioner), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 3 FCC Rcd 1601 (1988), proposing the substitution of Channel 257C2 for Channel 257A at Cornelia, Georgia, and the modification of its license for Station WCON-FM to specify operation on the higher powered channel. In addition, an *Order to Show Cause* was issued to Cohutta Broadcasting Company (Cohutta), licensee of Station WQMT(FM), proposing the substitution of Channel 255A for Channel 257A at Chatsworth, Georgia, and the modification of its license accordingly. Cohutta filed comments agreeing to the modification of its license, subject to reimbursement by the petitioner. Petitioner filed comments reiterating its intention to apply for Channel 257C2, if allotted to Cornelia, and to reimburse Station WQMT(FM) for the reasonable costs associated with the station's frequency change. No other comments were received.

2. We believe the public interest would be served by substituting Channel 257C2 for Channel 257A at Cornelia, Georgia, and substituting Channel 255A for Channel 257A at Chatsworth, Georgia, since it could enable Station WCON-FM to expand its coverage area. Channel 257C2 can be allotted to Cornelia in compliance with the Commission's minimum distance separation requirements and can be used at Station WCON-FM's present transmitter site. Channel 255A can be allotted to Chatsworth in compliance with the Commission's minimum distance separation requirements and can be used at Station WQMT(FM)'s present transmitter site.[1] As proposed, we shall also modify petitioner's license for Station WCON-FM to specify operation on Channel 257C2.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 5, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Chatsworth, Georgia	255A
Cornelia, Georgia	257C2

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Habersham Broadcasting Company for Station WCON-FM, Cornelia, Georgia, IS MODIFIED effective **December 5, 1988,** to specify operation on Channel 257C2 in lieu of Channel 257A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Cohutta Broadcasting Company for Station WQMT(FM), Chatsworth, Georgia, IS MODIFIED to specify operation on Channel 255A in lieu of Channel 257A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WQMT(FM)'s license, BLH-7282, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-7282, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

6. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the licensee of Station WQMT(FM), as follows: Cohutta Broadcasting Company, Box 738, Chatsworth, Georgia 30705.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 257C2 at Cornelia are North Latitude 34-30-57 and West Longitude 83-32-20. The coordinates for Channel 255A at Chatsworth are North Latitude 34-45-29 and West Longitude 84-43-59.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-604

In the Matter of

Amendment of Section 73.202(b), RM-6089
Table of Allotments,
FM Broadcast Stations.
(Waynesboro, Tennessee)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1988; Released: October 20, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 2326 (1988), issued at the request of Pioneer Radio, Inc. (petitioner), licensee of AM Station WTNR at Waynesboro, Tennessee, proposing the allotment of Channel 235A to Waynesboro, Tennessee, as that community's first local FM service. Petitioner filed supporting comments reaffirming an interest in applying for the channel.

2. The allotment of Channel 235A can be made in compliance with the Commission's minimum distance separation requirements with a site restriction of 3.9 kilometers (2.4 miles) south of Waynesboro.[1] The restriction is necessary to avoid a short spacing to a pending proposal for the substitution of Channel 232C2 for 232A (Station WIST(FM)), at Lobelville, Tennessee.[2]

3. We believe the public interest can be served by the allotment of Channel 235A to Waynesboro, Tennessee, as that community's first FM service. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 5, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Waynesboro, Tennessee	235A

4. The window period for filing applications will open on **December 6, 1988,** and close on **January 5, 1989.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The restricted site coordinates are 35-17-08 and 87-45-16.

[2] *See* MM Docket No. 88-22, 3 FCC Rcd 673 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-603

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Brownfield, Texas) — RM-6084

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1988; Released: October 20, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Brownfield Broadcasting Corp. (petitioner), licensee of Station KKTC(FM), Channel 280A, Brownfield, Texas, the Commission considers herein the *Notice of Proposed Rule Making*, 3 FCC Rcd 231 (1988), proposing the substitution of Channel 282C2 for Channel 280A at Brownfield and modification of its station's license to specify operation on the higher class channel. Petitioner filed supporting comments restating its intention to apply for the improved facilities. Adams-Shelton Communications (Adams-Shelton), licensee of Station KPMB(FM), Channel 280A, Plainview, Texas, also filed supporting comments.[1]

2. Channel 282C2 can be substituted for Channel 280A at Brownfield in compliance with the Commission's minimum spacing requirements with a site restriction of 5.1 kilometers (3.2 miles) east of the community.[2] The restriction is necessary to protect the site specified in the construction permit for Channel 281C at Carlsbad, New Mexico.

3. We conclude that the public interest would be served by the substitution of Channel 282C2 for Channel 280A at Brownfield, providing that community with a first wide coverage area FM service. We are herein modifying the license of Station KKTC(FM) to specify operation on Channel 282C2 in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 5, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Brownfield, Texas	282C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KKTC(FM), Brownfield, Texas, IS MODIFIED, to specify operation on Channel 282C2 in lieu of Channel 280A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Adams-Shelton simultaneously filed a petition for rule making requesting the substitution of Channel 280C1 for Channel 280A at Plainview and modify the license of Station KKTC(FM). The proposal is contingent upon favorable action being taken herein. Thus, the Plainview petition will be the subject of a separate proceeding (RM-6460).

[2] The restricted site coordinates are 33-11-39 and 102-13-23.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

SOUTHWESTERN BELL
TELEPHONE COMPANY

Petition for Waiver
of Part 69 Regarding
Interim 900 Access Service

ERRATUM

Released: October 20, 1988

1. In the Order in the above-entitled matter, released September 28, 1988, DA 88-1527, several lines of text were inadvertently omitted from footnote 2.

2. Footnote 2 should read as follows:

> Southwestern also requested in its petition a waiver of Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. However, a request for a waiver of Part 61 requires submission of an application for special permission. Southwestern filed such an application and it was granted by the Chief, Common Carrier Bureau, on September 21, 1988. Therefore, Southwestern's request for a waiver of Section 61.38 contained in its petition is now moot.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Lincoln Telephone and Telegraph Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs	AAD 7-1689

MEMORANDUM OPINION AND ORDER

Adopted: October 13, 1988; Released: October 20, 1988

By the Chief, Common Carrier Bureau:

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I. INTRODUCTION AND BACKGROUND

1. On August 31, 1987, the Lincoln Telephone and Telegraph Company (LT&T) filed a cost allocation manual pursuant to the *Joint Cost Order* [1] governing the accounting separation of LT&T's regulated and nonregulated costs.[2] Consistent with the requirements of the *Joint Cost Order*, LT&T implemented the manual on January 1, 1988, concurrent with the implementation of the revised Uniform System of Accounts (USOA). [3] The manual includes a list of LT&T's nonregulated activities, a list of activities LT&T treats as incidental to regulated activities for accounting purposes, information on affiliate transactions, information on employee time reporting, and information describing how each revised USOA account is allocated between regulated and nonregulated activities.

2. Two parties filed comments on LT&T's manual, and LT&T filed a reply.[4] In addition to reviewing the pleadings, we have conducted our own review of the LT&T manual to determine its consistency with the Commission's rules and policies. We have concluded that while the LT&T manual is deficient in some respects, its format and content generally provide the Common Carrier Bureau (Bureau) with a sufficient understanding of the proposed cost allocation procedures to permit us to make an informed judgment as to the ability of the manual to discourage cross subsidy. We conclude that, overall, LT&T's manual provides sufficient assurance against the misallocation of costs and revenues to permit LT&T to continue to apply its manual pending submission of a revised manual that meets all Commission requirements.

3. We require that LT&T specify in greater detail the procedures it intends to follow in apportioning the costs and revenues of regulated and nonregulated activities, and, in certain instances, that LT&T correct ambiguities and omissions in its manual. We require LT&T to submit revisions to its manual, and we shall solicit public comment on them. Any revisions to the manual that result from the instant Order should be made effective retroactive to January 1, 1988, to the extent possible.[5] We therefore approve LT&T's cost allocation manual subject to a number of conditions and requirements for the submission of further information.

4. This Order is divided into three substantive sections. Section II discusses general issues, including issues regarding the portions of the manual that relate to nonregulated activities, incidental activities, affiliate transactions, and employee time reporting. Section III discusses issues raised in connection with the proposed apportionment methods and specific accounts. Section IV discusses certain procedural requirements for updating cost allocation manuals.

II. GENERAL ISSUES

A. Overall Sufficiency of the Manual

5. The *Joint Cost Order* listed five types of information that must be included in cost allocation manuals: (a) a description of each nonregulated activity; (b) a list of all the activities the company now accords incidental accounting treatment, and the justification for treating each as incidental; (c) a chart showing all corporate affiliates; (d) a statement identifying affiliates that engage in or will engage in transactions with the carrier entity and describing the nature, terms and frequency of such transactions; and (e) for each USOA account and subaccount, detailed specifications of the cost categories (or cost pools) to which amounts in the account or subaccount will be assigned, and of the allocation method for each cost category (or pool).[6] In addition, the manuals must describe the methods used to teach, monitor, and enforce accurate time reporting, as well as the methods for capturing and allocating the costs of nonproductive time.[7]

6. Generally, we find that LT&T's manual contains cost accounting procedures that are adequate to meet our requirements and that are at a level of detail necessary for us to conclude that the manual's procedures will discourage cross subsidy. Moreover, we believe that, overall, LT&T's manual will provide an adequate basis for Commission audits. We note, however, that a number of ambiguities and omissions exist in the manual that must be corrected by the submission of additional information and amendments. We do not believe, however, that these omissions or other defects in LT&T's manual require its rejection. Instead, we believe the best procedure is to

permit LT&T to continue to implement its manual, while requiring it to make revisions. Our approval of LT&T's manual, therefore, is conditioned upon the timely submission of revisions responsive to the matters discussed in this Order.

B. Nonregulated Activities

7. The LT&T manual provides the requisite description of LT&T's nonregulated activities.[8] LT&T lists five types of nonregulated activities that it offers: (1) Customer Premises Operations, which are comprised of sales, leasing, installation and maintenance of terminal equipment and the installation and maintenance of inside wire; (2) Private Network/Transport Services, consisting of local transmission services that include dedicated facilities which serve to transport internal communications within end user operations, a dedicated interexchange carrier switch which is leased to an interexchange carrier, and long distance transmission service (LDTS) which provides certain interexchange facilities leased to interexchange carriers; (3) Data Communications, consisting of the PrarieLink data communications network service utilizing packet switching; (4) Information Services, comprised of a VideoText display of public interest information and advertising through graphics and other text; and (5) Miscellaneous, consisting of consultative and management services regarding interexchange services required by end-users and the operation of a retail electronics franchise. Neither of the parties commented on LT&T's nonregulated activities, and our review of these activities confirms that LT&T has met the requirements of the *Joint Cost Order* on this matter.

C. Incidental Activities

8. LT&T's manual also provides, as required, a list of nonregulated activities that are offered on an incidental basis to regulated activities.[9] In the *Joint Cost Order*, the Commission permitted carriers to account for incidental activities as regulated activities, provided that each of the activities meets the following quantitative and qualitative tests: (a) the activity must be an outgrowth of regulated operations; (b) it cannot constitute a separate line of business; (c) it must have traditionally been treated as incidental for accounting purposes; and (d) the revenues from all of a carrier's incidental activities must not exceed one percent of its total revenues.[10]

9. Our review of the incidental activities section of LT&T's manual[11] indicates that, with one exception, LT&T has met the requirements of the *Joint Cost Order*. The exception concerns LT&T's treatment of activities that involve provision of services to affiliates. Services provided to affiliates must always be treated for accounting purposes as affilate transactions.[12] LT&T must delete from its list of incidental activities any activity that is an affiliate transaction. Additionally, LT&T must amend the affiliate transaction section of its manual to reflect the addition of any activity that it previously listed as incidental.

D. Affiliate Transactions

10. The *Joint Cost Order* establishes specific rules governing the provision of assets and services to and from affiliates. These rules were adopted in order to discourage carriers from avoiding the cost allocation rules through affiliate transactions. For example, if a carrier wished to cross subsidize a nonregulated activity, it could, in the absence of the affiliate transaction rules, engage in that activity through a separate but affiliated company which would receive assets or services from the carrier at prices less than the carrier's fully distributed costs. The affiliate transaction rules specify the valuation standards that will be applied in accounting for transactions between a carrier and its affiliates. Those rules vary depending upon whether the transaction involves assets or services.[13] The *Joint Cost Order* also required that carriers include in their cost allocation manuals "[a] statement identifying affiliates that engage in or will engage in transactions with the carrier entity and describing the nature, terms, and frequency of such transactions."[14]

11. LT&T's manual contains a section that lists and briefly describes the affiliates with which LT&T has transactions, and the nature and frequency of these transactions.[15] Our review of this section reveals that while LT&T has described the nature and frequency of the transactions, it has not provided any information on the terms of the transactions as required by the *Joint Cost Order*. LT&T must amend its manual to provide information of the terms of the transactions it has with its affiliates.

12. Additionally, it is not clear from LT&T's descriptions of its transactions whether the asset or service rules apply. For example, under the heading of transactions with Lincoln Telephone Service and Supply Company (LTS&S), LT&T lists "Monthly payments for LTS&S for the purchase of telecommunications equipment."[16] Similarly, under that same heading, LT&T lists "Periodically LTS&S purchases surplus telecommunications equipment."[17] Nothing in the descriptions of the particular transactions, however, indicates whether the transactions involve the transfer of assets, the provision of services, or both. LT&T must amend its manual to correct this ambiguity with regard to each of its affiliate transactions.

E. Employee Time Reporting

13. The *Joint Cost Order* permits carriers to select from among several methods of recording employee time. The Commission reasoned that, since the use of wages and salaries would serve as an important technique in the allocation of costs, it was important that carriers use accurate methods of recording employee time. The Commission further found that no one time reporting system would provide accurate results in all situations. Carriers were therefore free to propose the use of positive time reporting or exception time reporting, or to develop special studies to keep track of employee time. The *Joint Cost Order* also required that carriers include in their manuals a description of the methods used to teach, monitor and enforce accurate time reporting. In addition, carriers must describe methods used to capture the costs of nonproductive time and the methods used to allocate those costs.[18]

14. In its cost manual, LT&T proposes using two time reporting methods: (1) positive time reporting and (2) exception time reporting.[19] There were no comments filed regarding LT&T's time reporting procedures and methods.

15. Our review of LT&T's treatment of employee time reporting shows that LT&T must provide additional information on this matter in its revised manual. Initially, while LT&T identifies groups of employees to which various time reporting methods apply, it gives no indication of whether these time reporting methods apply to support staff and management of these groups. LT&T must amend its manual to clarify this matter. Furthermore, LT&T states in its discussion of exception time reporting that in certain instances it uses surveys, studies or analyses to develop surrogate measures of work activity.[20] It does not, however, describe the underlying development of these measures. LT&T is directed to describe in its revisions any surveys, studies or analyses it uses to develop surrogate measures of work activity for employees subject to exception time reporting, and to explain how these surveys, studies, or analyses are prepared. Finally, LT&T must provide more information on its procedures for capturing nonproductive time. While its manual discusses the accounting for nonproductive time used by various work groups,[21] it does not provide the details of its procedures for capturing this time. LT&T must amend it manual to provide this information.

F. Joint Use of Network Plant

16. In the *Joint Cost Order*, the Commission established that jointly-used network plant (central office equipment and outside plant) must be allocated based on a forecast of the peak relative nonregulated usage of the plant over its entire depreciable life. The Commission elected to adopt a forecasted use approach in order to reflect the nature of capital investment decisions, *i.e.*, that investment decisions are made in anticipation of future use.[22] On reconsideration, the Commission reduced the length of the forecast period to three years in recognition of the practical difficulties of forecasting relative use over a lengthy depreciation period.[23]

17. In its original manual (filed August 31, 1987, Section 2.4) LT&T stated that it is not engaged in any nonregulated activities that utilize joint use of network plant. Therefore, it did not include in its manual a method for apportioning shared network costs on a projected usage basis. In its comments, IBM notes that although LT&T does not currently intend to use network plant jointly, and will provide transmission services used in its own nonregulated activities at tariffed rates, it should be required to revise its cost manual to implement the principle of allocation of investment risks before it begins to share investments.[24] In the revisions to its manual (filed March 31, 1988, Section 2.4), LT&T states that because of a structural change that resulted in LT&T offering interexchange facilities and a nonregulated data communications service, it amended its manual to include a forward-looking allocator based on a three-year forecast period as directed by the Commission. In view of LT&T's amendment to it manual on this matter, we believe that IBM's concerns have been addressed.

III. ACCOUNT - BY - ACCOUNT ANALYSIS

18. LT&T's manual describes the methods it proposes to use to derive cost pools and to apportion costs between regulated and nonregulated activities. First, LT&T provides a narrative description of cost accounting concepts, cost pool assignment bases, and cost pool apportionment bases.[25] Second, LT&T provides apportionment information in table format.[26] In addition to addressing the issues raised by the parties with respect to the cost pool assignment and cost apportionment bases for individual accounts contained in the manual, we have reviewed the manual and identified additional issues to be resolved. Before discussing these specific account issues, however, we will note several required accounts that are not included in LT&T's manual.

A. Accounts To Be Added

19. In the *Joint Cost Order*, the Commission required that carriers submit allocation proposals for each USOA account and subaccount.[27] Since that requirement would have mandated the allocation of amounts that are not used in the jurisdictional separations and interstate ratemaking processes, the *ARMIS Order* eliminated the allocation requirement for particular accounts.[28] Appendix C to the *ARMIS Order* listed for the first time the particular USOA accounts and subaccounts that would be subject to joint cost reporting. In addition, the Commission required carriers to report on six additional accounts used in the interstate ratemaking process. These additional accounts are: Account 2004 - Telecommunication Plant Under Construction-Long Term, Account 2441 - Conduit Systems, Account 4120 - Other Accrued Liabilities, Account 4360 - Other Deferred Credits, Account 5050 - Customer Premises Revenue, and Account 7150 - Gains and Losses from Disposition of Land and Artworks.[29]

20. Because the list released in the *ARMIS Order* was not available until after LT&T filed its manual, the manual omits many accounts contained on that list. The manual also omits four of the six accounts listed above – Account 4120 - Other Accrued Liabilities, Account 4360 - Other Deferred Credits, Account 5050 - Customer Premises Revenues, and Account 7150 - Gains and Losses from the Disposition of Land and Artworks. We direct LT&T to amend its manual to include allocation proposals for each of the omitted accounts.[30] If, in making these revisions, LT&T finds that there are accounts for which it has nothing to report, it must list these accounts in its manual and indicate that it has nothing to report.

B. Other Issues

21. In several instances in its cost apportionment tables. LT&T notes that "[P]lant used exclusively for nonregulated activities will be directly assigned to the appropriate nonregulated account,"[31] or that "[C]osts which can be directly assigned to nonregulated activity are charged to the appropriate nonregulated account."[32] LT&T states that it maintains a set of nonregulated accounts and that it will directly assign costs used exclusively for nonregulated activities to an appropriate nonregulated account.[33] The *Joint Cost Order* prohibits the use of separate books of accounts for nonregulated activites that use common plant.[34] Additionally, as we have stated eleswhere, separate books of account are not permissible if any nonregulated activities benefit from any joint or common costs, including residual overhead costs.[35] LT&T has presented no evidence that any of its nonregulated activites do not

benefit from some joint or common plant, or, at a minimum, some residual overheads. Moreover, the purpose of the cost allocation manual is to provide a regulatory check on the ability of carriers to apportion their costs between regulated and nonregulated operations. The manual must therefore reflect all of a carrier's cost and revenues that we must evaluate to ensure that the Commission's requirements are being met. Excluding an unspecified amount of costs and revenues from the manual does not provide us with sufficient information to ensure that the Commission's rules are being followed. Accordingly, we will not allow LT&T to use separate books of accounts for nonregulated activities. LT&T is directed to amend its cost manual to allocate all investments, expenses, and revenues used "exclusively" for nonregulated activites to a nonregulated cost pool under the appropriate regulated account, and to assign those costs or revenues directly to nonregulated activites. Moreover, after such amendments are made, LT&T must recaluate its general allocator to reflect the addition of these nonregulated costs and revenues.

C. Specific Accounts

Account 2112 - Motor Vehicles and Account 6112 - Motor Vehicle Expense

22. LT&T proposes to apportion the "residual" costs in these accounts to regulated and nonregulated actvities on the basis of the general allocator. Initially, LT&T must define "residual" as it applies to these accounts. Further, LT&T must explain why a more cost-causative menthodology cannot be used to apportion these "residual" costs.

Account 2115 - Garage Work Equipment and Account 6115 - Garage Work Equipment Expense

23. LT&T states that it will not use these accounts, but rather will charge all costs associated with "Garage Work Equipment" to Account 6112, Motor Vehicle Expense. LT&T has not explained why it does not use these accounts. We require LT&T to include these accounts in its cost manual, with an appropriate explanation of why they are not used. Additionally, LT&T is directed to explain the circumstances that would result in the use of these accounts at some future time.

Account 2441 - Conduit Systems

24. LT&T proposes to assign the costs in this account directly to regulated activities. When a nonregulated cable uses a regulated conduit, however, LT&T proposes that the nonregulated activity be billed a unit market rental rate. AT&T notes that the *Joint Cost Order* rejected the use of a rental rate to compensate for nonregulated use of assets, requiring instead that a portion of the asset itself be assigned to nonregulated operations.[36] LT&T responds that it does not interpret the *Joint Cost Order* as specifically rejecting the approach it uses, and in any event, the space dedicated to nonregulated operations is very minor.[37] We agree with AT&T on this matter, and direct LT&T to amend its manual to assign a portion of conduit systems investment to nonregulated activities.[38]

Account 2124 General Purpose Computers and Account 6124 - General Purpose Computer Expenses

25. LT&T apportions the "Terminals" and "Word Processor" cost pools in these accounts to regulated and nonregulated activities on the basis of the general allocator. LT&T must explain why a more cost causative allocator cannot be used to apportion the costs in these cost pools.

Account 2681 - Capital Leases and Account 2690 - Intangibles

26. AT&T states in its comments that although LT&T's manual omits Account 2681, Capital Leases, it addresses Account 3410, Accumulated Amortization - Capital Leases, which indicates that LT&T will have capital lease costs that should be included in Account 2681.[39] Similarly, AT&T notes, LT&T's manual omits Account 2690, Intangibles, but addresses Account 6564, Amortization Expense - Intangibles, which shows that LT&T expects to incur costs for intangibles.[40] In its reply, LT&T filed an amendment to its cost manual to add Account 2681, Captial Leases and Account 2690, Intangibles, along with the appropriate cost apportionment methodology.[41] We concur with this amendment.

Account 3600 - Accumulated Amortization Other

27. AT&T observes that LT&T omits Account 3600, Accumulated Amortization - Other, but addresses the associated investment account, Account 2005, Telecommunications Plant Adjustment, and the related expense account, Account 6565, Amortization Expense - Other, indicating that LT&T will have a balance in Account 3600 to be allocated.[42] In its March 31, 1988, amendments to its manual, LT&T included Account 3600, along with the the appropriate cost apportionment procedures. We concur with this amendment.

Account 6351 - Public Telephone Terminal Equipment

28. LT&T has mistakenly numbered this account as Account 6231, rather than Account 6351. LT&T must correct its manual accordingly.

Account 6311 - Station Apparatus Expense, Account 6341 - Large Private Branch Exchange Expense, and Account 6362 - Other Terminal Equipment Expense

29. In it comments, AT&T states that LT&T fails to specify any procedures for the assignment of expenses related to its provision of inside wire, a nonregulated activity.[43] According to AT&T, those expenses could be recorded in Account 6311, Station Apparatus Expense; Account 6341, Large Private Branch Exchange Expense; or Account 6362, Other Terminal Equipment Expense.[44] AT&T notes, however, that LT&T fails to address Accounts 6311 and 6341, and assigns Account 6362 entirely to regulated activities.[45] LT&T states in response that it maintains several nonregulated accounts to which inside wire costs are to be assigned directly and thus these expenses need not be addressed in the accounts AT&T suggests.[46] We disagree with LT&T. As we have stated in paragraph 21, *supra*, LT&T must establish cost pools for its nonregulated costs within the appropriate regulated account and then assign those costs to nonregulated activities. Accordingly, we direct LT&T to amend its manual to include Accounts 6311, 6341, and 6362. Moreover, LT&T

must establish in Account 6362 a cost pool for its expenses related to its provision of inside wire, and directly assign the costs in that pool to nonregulated activities.

Account 6531 - Power Expense

30. LT&T will assign the costs in this account directly to regulated operations. AT&T notes that LT&T's procedures for this account ignore the fact that all central office equipment generates power expense, and as LT&T will use some central office equipment contained in Account 2220, Operator Systems, for nonregulated operations, a portion of LT&T's power expense should be allocated to nonregulated operations based on the assignment of all central office equipment accounts.[47] In response, LT&T states that it believes that its consumption of power for nonregulated activities in account 2220 is *de minimus* and need not be addressed in its manual.[48] We disagree with LT&T. Because it uses some central office equipment for nonregulated activities, LT&T must amend its manual to apportion power expense based on the apportionment of all central office equipment investment accounts.

Accounts 6532 - Network Administration Expense and Account 6535 - Network Design and Planning

31. LT&T proposes to assign all the costs in these accounts directly to regulated operations. AT&T observes that network administration expense is incurred for all central office equipment and outside plant, and LT&T assigns not only some of Account 2220 to nonregulated operations, but also some outside plant in Account 2441, Conduit Systems.[49] Accordingly, AT&T contends, LT&T should allocate network administration expense based on all central office and outside plant accounts.[50] Similarly, AT&T notes, Network Design and Planning expenses are incurred for the benefit of network operations and therefore bear a direct relationship to the aggregate investment in central office equipment and outside plant.[51] Thus, AT&T states, LT&T should be required to allocate these expenses based on central ofice and outside plant accounts.[52] In response, LT&T contends that it offers no nonregulated products or services that involve joint use of network plant, and therefore it can assign these costs directly to regulated activities. LT&T states, however, if in the future it offers nonregulated services using joint plant, it will amend its manual accordingly.[53] In the amendments to its cost manual submitted March 31, 1988, LT&T states that it is now using network plant jointly to provide a nonregulated service, and as result revised several accounts in its cost apportionment table to reflect this change.[54] LT&T did not, however, make any revisions to Accounts 6532 and 6535. LT&T is directed to amend its manual to apportion the expenses in these two accounts based on the apportionment of central office and outside plant accounts.

Account 6564 - Amortization - Intangibles

32. LT&T proposes to assign all costs in this account directly to regulated activities. At the same time, however, LT&T will apportion Account 2690, Intangible Investment, to regulated and nonregulated activities according to an analysis of each intangible component. LT&T is directed to amend its manual to apportion Account 6564 on the same basis as the related investment account.

Account 6722 - External Relations Expense

33. LT&T apportions the unattributable costs contained in this account using the general allocator. AT&T notes that the *Joint Cost Order* specifically rejected this approach as applied to residual corporate advertising, and required that such advertising expenses be allocated on the basis of directly assigned and attributable marketing costs.[55] In reply, LT&T states that it will revise it manual in accordance with AT&T's suggestion.[56] We concur with this change. LT&T also assigns the expenses in the "regulatory" relations cost pool directly to regulated activities. We require LT&T to amend its manual to apportion some of the expenses in this cost pool to nonregulated activities to reflect its contact with regulatory authorities concerning nonregulated services.

Account 6724 - Legal Expenses

34. LT&T will have three cost pools for this account, Regulated," "Nonregulated," and "Common," and will directly assign the regulated and nonregulated costs. The common pool is apportioned based on the general allocator. The common pool includes both common legal expenses and overhead expenses, such as law library and and general research costs. Since the overhead expenses support all of the LT&T activities for which legal expenses are incurred, LT&T should create a separate cost pool for overhead expenses. While we have no objection to use of the general allocator to allocate the common expense cost pool, LT&T must apportion the "overhead" cost pool in the same proportion as its directly assigned legal expenses are apportioned. LT&T shall amend its manual accordingly.

Account 6728 - Other General and Administrative Expense

35. LT&T proposes the use of the general allocator to apportion three of the six cost pools in this account. We believe the use of the general allocator is inappropriate for apportioning the "Insurance, Losses, and Damages" cost pool because it does not adequately reflect cost causational principles. In its revised manual, LT&T is directed to explain why it cannot use a more cost causative allocation methodology for this cost pools.

IV. PROCEDURAL ISSUES

36. In this section we address two procedural issues affecting LT&T's cost allocation manual. These issues are: (a) the submission of a revised manual in compliance with this Order, and (b) the routine submission of future amendments to the manual.

37. *Revised manual.* We have required LT&T to submit several amendments clarifying and changing many of its cost apportionment procedures. We have also directed LT&T to submit additional information concerning its incidental activities, affiliate transactions, and time reporting mechanisms. In many cases, the additional information requested is needed to form a judgment concerning the reasonableness of LT&T's proposed methods. In the *Joint Cost Order*, the Commission specifically provided for public comment on the manuals so that a determination on their compliance with Commission requirements would be based on a full record and so that the cost allocation methodologies would be exposed to public scrutiny prior

to their implementation.[57] Similarly, we believe that our review of LT&T's amendments will be aided by public comment on the revisions.

38. We will evaluate the proposed revisions, as well as the comments that we receive, before issuing an order approving or disapproving the amendments. If we disapprove a proposed revision, we shall take whatever further action is required, including mandating specific allocation methodologies or other procedures, consistent with our delegated authority to implement cost allocation manuals. In addition, to facilitate our review of the updated manual and its availability to the public, LT&T shall file two updated copies of its revised manual with the Commission in looseleaf form with numbered and dated pages, within 60 days of the release date of this Order.[58] When amendments are submitted, each revised page must clearly indicate the word "REVISED" and the date next to the page number. All amended language must be indicated by a vertical line in the right margin of the page.

39. *Routine amendments.* We also must resolve the issue of the procedures LT&T will be required to follow when updating its cost allocation manual. We conclude that LT&T will be subject to the same requirements that we imposed on the Bell Operating Companies (BOCs).[59] As we have determined in the BOC context, we recognize that the accuracy of different sections of the manual will have different effects on our ability to monitor the cost allocation process. Therefore, we will apply the following requirements for the update of LT&T's manual. First, because it is important for the Commission to obtain current information on the cost categories and how these are allocated between regulated and nonregulated activities, several categories of information require our attention before the manual is implemented. These are: (1) changes to the cost categories and their allocation mechanisms; and (2) changes in the way employee time, including nonproductive time, is allocated. Each of these changes in the cost manuals must be submitted at least 60 days prior to implementation. Parties seeking to comment on the proposed amendments will be provided an opportunity to do so prior to implementation and will be notified by public notice of the comment dates. The proposed amendments to the manual will be deemed accepted unless the Bureau, pursuant to its delegated authority, rejects or stays the effectiveness of the change.[60]

40. Second, because other information, such as corporate structure, may not be quite as critical for cost allocation monitoring purposes, we require that LT&T file such changes in a timely manner.[61] A modification to a carrier's cost manual to reflect a corporate reorganization does not require our advance approval and, therefore, does not need to be filed prior to the corporate restructuring. Finally, all other changes to the manual should be submitted quarterly, on March 31, June 30, September 30 and December 31 of each year.

41. We believe that these procedures will ensure that the ongoing process of implementing cost allocations will continue to be conducted according to the requirements in the *Joint Cost Order*. At the same time, they minimize the number of times LT&T must seek prior Commission approval before implementing a change and provides a system to ensure timely review of LT&T's proposals.

V. ORDERING CLAUSES

42. ACCORDINGLY, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), that the Cost Allocation Manual filed by LT&T IS APPROVED, subject to the conditions noted in this Order.

43. IT IS FURTHER ORDERED that revised copies of the Cost Allocation Manual shall be submitted within 60 days from the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Separation of costs of regulated telephone service from costs of nonregulated activities, *Report and Order*, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on recon.*, 2 FCC Rcd 6283 (1987) (*Reconsideration Order*), *petitions for further recon. pending.*

[2] On October 15, 1987, LT&T, in its reply to AT&T's comments, filed several revisions to its cost allocation manual. Additionally, on March 31, 1988, as a result of a structural change within the company, LT&T filed several additional revisions to its manual. Copies of all revisions were served on the parties to this proceeding. Our review is of LT&T manual, as revised March 31, 1988.

[3] 47 C.F.R. Part 32.

[4] Comments were filed by: American Telephone and Telegraph Company (AT&T) and International Business Machines Corporation (IBM).

[5] In those instances where LT&T cannot make revisions retroactive to January 1, 1988, it must explain in a cover letter accompanying its revised manual its reasons for not doing so. With regard to those revisions that LT&T claims that it cannot make retroactive, we reserve the right to require retroactivity, or that subsequent adjustments be made to reflect the impact of the lack of retroactivity on 1988 operations.

[6] *Joint Cost Order*, 2 FCC Rcd at 1328. The *Joint Cost Order* uses the term "cost categories" to describe groupings of costs that are homogeneous in nature for cost allocation purposes. The accounting profession's term for "cost categories" is "cost pools." We will use the two terms interchangeably in this Order.

[7] *Id.* at 1321-22.

[8] LT&T Manual at Section 3.

[9] *Id.* at Section 4.

[10] *Joint Cost Order*, 2 FCC Rcd at 1328.

[11] LT&T Manual at 4.1.

[12] *See* Pacific Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 287, 290 (1988) (*Pacific Order*).

[13] *See Joint Cost Order*, 2 FCC Rcd at 1355, and *Reconsideration Order*, 2 FCC Rcd at 6295. Carriers must value services at the prevailing price, if the service is generally available to the public. If it is not generally available, carriers must allocate the cost of the service pursuant to the cost allocation standards of Section 64.901 of the Commission's Rules. For assets, carriers must record transactions at the prevailing price, if one exists. If

not, carriers must record assets transferred from the affiliate to the carrier at the lower of net book cost or fair market value, while assets transferred from the carrier to the affiliate will be recorded at the higher of net book cost or fair market value. *Joint Cost Order*, 2 FCC Rcd at 1343, 1345, *amended by Reconsideration Order*, 2 FCC Rcd at 6308-09.

[14] *Joint Cost Order*, 2 FCC Rcd at 1328.

[15] LT&T Manual at Section 6.

[16] *Id.*

[17] *Id.*

[18] *Joint Cost Order*, 2 FCC Rcd at 1321-22.

[19] LT&T Manual at Section 7.

[20] *Id.*

[21] *Id.*

[22] *Joint Cost Order*, 2 FCC Rcd at 1319.

[23] *Reconsideration Order*, 2 FCC Rcd at 6288.

[24] IBM Comments at 4, n. 4.

[25] LT&T Manual at 8.1-8.3.

[26] *Id.* at 8.4-8.34.

[27] *Joint Cost Order*, 2 FCC Rcd at 1328.

[28] Automated Reporting Requirements for Certain Class A and Tier I Telephone Companies, *Report and Order*, 2 FCC Rcd 5770, 5775 (1987) (*ARMIS Order*), *petitions for reconsideration pending*.

[29] Carriers must include these accounts in future releases of the *ARMIS* reporting requirements.

[30] AT&T, in its comments, notes that LT&T does not address twenty-seven accounts in its manual that could affect the inclusion of costs in the regulated ratemaking process. (AT&T Comments at 2). In revisions to its manual LT&T addresses six of those twenty-seven accounts. (LT&T Reply at 1-2 and attachment, and LT&T March 31, 1988, revisions.) We direct LT&T to amend its manual to include all omitted accounts.

[31] *See, e.g.*, LT&T Manual at 8.4-8.15.

[32] *See, e.g., id.*, at 8.16-8.32.

[33] LT&T Reply at 1.

[34] *Joint Cost Order*, 2 FCC Rcd at 1337-40.

[35] *See*, US West's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 195, 202 (1988).

[36] AT&T Comments at 4, citing *Joint Cost Order*, 2 FCC Rcd at 1337.

[37] LT&T Reply at 2.

[38] LT&T proposed in its August 31, 1987 manual to compensate regulated operations for the nonregulated use of certain land and buildings by billing nonregulated operations a rental rate. In it March 31, 1988, revisions, however, LT&T amended its manual to have these nonregulated costs placed into a nonregulated cost pool and assigned to nonregulated activities. *See*, Amendmends to the Cost Allocation Manual, Lincoln Telephone and Telegraph Co. at 8.A.1.

[39] AT&T Comments at 2.

[40] *Id.* at 3.

[41] LT&T Reply at 1.

[42] AT&T Comments at 2-3.

[43] AT&T Comments at 3.

[44] *Id.*

[45] *Id.*

[46] LT&T Reply at 2.

[47] AT&T Comments at 4.

[48] LT&T Reply at 2-3.

[49] AT&T Comments at 5.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] LT&T Reply at 3.

[54] *See* Amendmentments to the Cost Allocation Manual, Lincoln Telephone and Telegraph Company, March 31, 1988.

[55] AT&T Comments at 4, citing *Joint Cost Order*, 2 FCC Rcd at 1323-24.

[56] LT&T Reply at 2.

[57] We require LT&T to serve copies of its revised manual on all parties to this proceeding.

[58] One copy will be made available in the Accounting and Audits Division reference room, while the other will be maintained for staff use.

[59] *See, e.g., Pacific Order*, 3 FCC Rcd at 287.

[60] A stay of the effectiveness of a proposed change will not extend beyond 180 days.

[61] Of course, changes to corporate structure that also affect cost categories need to be filed in advance of implementation, as discussed *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY — AAD 7-1890

Petition for Waiver of
Section 64.702 of the
Commission's Rules (Computer II)
to Provide Protocol Conversion
on an Unseparated Basis

MEMORANDUM OPINION AND ORDER

Adopted: October 11, 1988; Released: October 13, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On December 3, 1987, New England Telephone and Telegraph Company (NET) filed a plan (the Compliance Plan) which, according to NET, demonstrates that its local packet switched service with protocol conversion (known as Infopath packet switched service), complies with all the conditions set forth in the Commission's *Protocol Waiver Order*.[1] The Compliance Plan describes the offering in terms of accounting, regulatory, and operational conditions, and details the manner in which the three conditions of the *Protocol Waiver Order* will be satisfied. For the reasons discussed below, we approve NET's Compliance Plan, subject to the conditions set forth herein.

II. BACKGROUND

2. The *Computer II* rules required certain common carriers to offer enhanced services, including protocol conversion,[2] only on an unregulated basis and through a separate entity. In the *Computer III* proceeding, the Commission replaced structural separation for the enhanced services of AT&T and the Bell Operating Companies (BOCs) with nonstructural safeguards. [3] The Commission established specific safeguards for the BOCs' provision of protocol conversion on a collocated basis, but acknowledged that for "me-too" waiver requests that follow the terms or conditions of *Computer II* waivers already granted for specific services, waiver of the *Computer III* requirements could also be appropriate.[4] We shall consider the NET Compliance Plan under the terms of the *Protocol Waiver Order*, since NET's offering is of asynchronous/X.25 protocol conversion collocated with packet switching, and purports to follow terms and conditions of waivers already granted under that *Order*.[5]

3. In April and May, 1984, several BOCs petitioned for waivers of the *Computer II* rules to offer an X.75 interface (an internetworking interface) within basic X.25 packet switched networks, and to allow conversion of asynchronous transmissions to the X.25 protocol. Asynchronous/X.25 protocol conversion allows most personal computers and many other kinds of asynchronous data terminals to communicate via packet-switched networks with host computers that send and receive data in the X.25 format. The petitioners asked the Commission to permit collocation of protocol conversion equipment in their central offices and to waive most or all of the structural separation conditions which ordinarily would have applied to an enhanced service offering by a BOC.

4. The Commission granted the X.25/X.75 proposals in November, 1984.[6] After requesting further information from the BOCs, it granted all but one of the waiver requests for asynchronous/X.25 protocol conversion.[7] The Commission concluded that the public interest would be served by allowing the BOCs to place asynchronous/X.25 protocol conversion capabilities within their central offices in order to achieve certain efficiencies which would significantly reduce data transport prices to customers.[8] It also found that permitting the provision of protocol conversion services within the network would enable BOCs to serve customers not effectively served by existing packet switching providers.[9] Most importantly, the Commission found that the diversion of data traffic from circuit-switched voice facilities onto more efficient local packet switched networks could eliminate the need for costly construction of new voice facilities which might otherwise be required to handle future increases in data traffic.[10]

5. Notwithstanding these conclusions, the Commission noted that an unconditional waiver of the *Computer II* rules might present the BOCs with opportunities for misallocation of costs or other anti-competitive behavior. Therefore, the Commission limited the scope of the waivers to allow the BOCs only to place protocol equipment within their central offices and to install and maintain any such collocated equipment. It did not grant permission for the BOCs to market protocol conversion services. Absent further showings, the Commission required the asynchronous/X.25 conversion services to be marketed through the BOC's enhanced services subsidiary, which would reimburse the telephone company for the investment and costs of providing the enhanced portion of the packet switched services to the subsidiary. To that end, the Commission ordered each BOC to file an accounting plan designed to allocate to its separate enhanced services affiliate all direct and indirect costs associated with installing and maintaining the protocol conversion equipment.[11] The accounting requirements of the *Protocol Waiver Order* have since been superseded by those of the *Joint Cost Order*.[12] That order requires the BOCs to prepare and file manuals containing procedures for separating the costs of regulated and nonregulated activities, including protocol conversion. We have conditionally approved NYNEX's cost allocation manual.[13]

6. In addition to the accounting requirements, the Commission placed three conditions on asynchronous/X.25 protocol conversion offerings. First, it required the BOCs to take the inter-office circuits used for their packet switched networks on the same terms and conditions which govern the use of those circuits by competitors. This condition is intended to prevent the BOCs from using their monopoly control over such circuits to discriminate against others who use the circuits to provide enhanced packet switched data transmission services.[14]

7. Second, the Commission directed the BOCs to include in their basic (X.25) packet switching tariffs a network utilization rate element (NURE) which must be paid

by a BOC's affiliate when it uses basic service to provide a customer with enhanced (asynchronous/X.25) packet services. This condition is intended to charge users of the enhanced service for the costs of any operational inefficiencies which protocol conversion imposes upon the network.[15] As an incidental effect, the price differential which the NURE creates between basic service and asynchronous/X.25 service also preserves the incentives for development of protocol conversion capabilities within customer premises equipment.[16]

8. The Commission's third condition requires the BOCs to provide end users with equal access, both to the protocol conversion offerings of the BOCs' separate enhanced services affiliate and for the protocol conversion offerings of other service providers. This condition requires the BOCs to make such access available on an unbundled, tariffed basis, without discrimination between BOC protocol conversion facilities and those of others. In particular, it prohibits offering of data-over-voice (DOV) access to the BOC network unless the BOC offers DOV access for the offerings of other enhanced service providers. This requirement also mandates that the BOCs provide "dialing parity" to other enhanced service providers. For instance, if abbreviated dialing is used to reach the BOC's packet switched service, comparable dialing must also be available to customers of other enhanced service providers.[17]

9. The third condition also affects the terms by which the BOC provides to its separate subsidiary the connection between the subsidiary's protocol conversion equipment and BOC subscribers. The collocation waiver permits these connections to be made using intra-office wire rather than local loops so that the BOC may derive cost savings equal to the difference between the tariff prices its affiliate will pay for the intra-office connections and the tariff prices other packet switched service providers must pay for the loops through which they connect with BOC central offices.[18] This condition, therefore, requires the BOCs to identify and explain these cost savings in the support material accompanying their tariff revisions.[19]

III. NET'S PROPOSAL

A. General

10. NET's proposed service, Infopath, is an optional, local data communications service employing digital transmission and switching technologies using "packetized" communications. The packetizing conventions associated with this service are embodied in international standards, called protocols, which are published by the International Telephone and Telegraph Consultative Committee (CCITT).

11. The network for providing Infopath service consists of packet switches, inter-office digital transmission facilities, statistical multiplexers with packet assembler and disassembler functionality (Stat Mux/PAD) and network administration facilities. Data enters the network at two speeds: low to medium speed (rates of up to 9600 bits per second) at the Stat Mux/PAD and high speed (up to 56,000 bits per second) at the switches. Low and medium speed end user synchronous data will be concentrated at the Stat/Mux PAD and forwarded via high speed digital circuits to a packet switch and then routed to their destination. High speed data will be routed directly to the packet switch, entering at either an X.25 or an X.75 protocol access arrangement or port for routing to appropriate destinations. End users will access the network through use of either the current switched network on a dial-up basis or over private line circuits. NET is not proposing to offer data-over-voice (DOV) service at this time. It states that if it desires to offer DOV access, it will make an additional filing with the Commission demonstrating compliance with applicable provisions of the *Protocol Waiver Order*.

12. Data terminals operating in an asynchronous mode (transmitting one character at a time in a start/stop communications scheme) will also be accommodated by the service network. The bit stream from an asynchronous terminal is accumulated at a Stat Mux/PAD and converted into packet format for processing forward through the packet network. Data returning to an asynchronous terminal is likewise converted from packet format to the start/stop, one character at a time method of operation at the Stat Mux/PAD before routing to the receiving end user data terminal.

13. The initial network for Infopath service will consist of two Siemens System EDX-P Packet Switches located at the Cambridge, Massachusetts central office. End user access to these switches will be provided through 29 Siemens Advanced Network Processors (ANP-2520) located in 25 wire centers serving eastern Massachusetts. The switches and Stat Mux/PADs will be linked together via NET's existing Digipath Digital Service tariff offering.

14. A Network Control Center will oversee the combined operations of the entire network. Operator intervention over the network elements, as well as network management and control, will be undertaken from the center via operator consoles. Employing a decentralized task-oriented multiprocessor architecture, the Center will manage background tasks, such as monitoring and managing the various network element or collecting billing information, while real time tasks, such as switching, data transfer and data adaptation (protocol conversion), will be handled by the switch nodes or the Stat Mux/PADs.

B. Compliance with the Protocol Waiver Order

15. NET's Compliance Plan contains accounting procedures that address the separation of costs and revenues associated with protocol conversion from the costs and revenues of basic services. However, as noted below, the accounting requirements of the *Protocol Waiver Order* have been superseded by the *Joint Cost Order*.[20] Thus, we do not address those accounting procedures herein.

16. With respect to condition one, the treatment of interoffice channels, NET states that it will use facilities that are currently offered pursuant to tariff for its packet switched network and will charge itself the tariff rates for such facilities.[21] NET further states that these same transmission facilities are available to other vendors at identical tariff rates, terms and conditions. Additionally, NET notes, as required by the *Protocol Waiver Order*, protocol conversion costs are not included in these rates.

17. To meet the requirements of condition two, the establishment of the NURE, NET describes the methodology and computations underlying its proposed NURE of two percent.[22] NET explains that the asynchronous/X.25 protocol conversion in its packet switching network takes place in the ANP 2520, which is generically a Stat Mux/PAD. NET states that the methodology employed to calculate the NURE is identical to that used by New York Telephone Company (NYT) to calculate its NURE for the

same equipment (except for the use of data specific to NET) that has already been approved by us.[23] The tariff NET has included in its filing contains the NURE as an unbundled rate element, as required by condition two.

18. Concerning condition three, pertaining to equal access, NET states that end users will obtain equal access to the NET network on either a dial-up or dedicated basis, and that these access methods will be available to end users of other packet switched service vendors on a tariffed basis under the same terms and conditions. According to NET, no special dialing arrangements will be used by the Infopath network and all customers will have the option of obtaining dedicated private line access to the packet network of any service provider under the provisions of generally available tariff offerings.

19. In connection with the provision of protocol conversion, NET states that all enhanced service providers, including NET, that are within the same exchange and access the central office switch in this same exchange, will pay the same rate for dial-up service. This proposal, according to NET, establishes pricing parity between NET and other enhanced service providers. NET also states that its customers served within the same exchange that the Stat Mux/PAD is located will pay the same tariff rate for an intraexchange private line as they would pay to reach a competitor's point of interface within that exchange. NET customers not served within the same exchange in which the Stat Mux/PAD is located will pay the same interexchange private line tariff rate as they would pay to reach a competitor's point of interface outside that exchange. NET submits that this also establishes pricing parity between NET and other enhanced service providers.

20. Finally, NET states that it will not offer DOV access to its packet switched network at this time. It further states that if DOV access is implemented in the future it will file the appropriate additional information with the Commission.

IV. SUMMARY OF PLEADINGS

21. Only one party, Telenet Communications Corporation (Telenet), filed comments on NET's Compliance Plan. NET filed a reply. These comments are summarized below.

22. Telenet states that NET's Compliance Plan satisfactorily addresses each of the three conditions contained in the *Protocol Waiver Order*. In particular, Telenet commends NET's comparably efficient interconnection (CEI) proposal to charge its enhanced packet switched service the same tariffed rates for local business lines for dial-up access to the network as any competitor in the local exchange would pay for comparable lines. This approach, Telenet submits, provides a fully "equal access" environment for packet switching competitors, and should serve as a model for other BOCs as well. Telenet argues, however, that NET is attempting to avoid Commission oversight of the rates, terms and conditions pertaining to its "basic" X.25 packet network through incorporation by reference to its state tariff. This approach, according to Telenet, is not consistent with the intent of the *Protocol Waiver Order*. Telenet asserts that the Commission should direct NET to file complete federal tariffs for its packet-switched network services, together with the appropriate cost support material.

23. In its reply, NET notes that Telenet does not take issue with the substantive aspects of the Compliance Plan, but only objects to our waiver of the rate referencing and cost support rules. NET states that Telenet's position that we should not grant permission for NET to reference its state tariff is without merit. NET argues that we have already approved protocol conversion compliance plans for other carriers that utilize rate referencing, and to single out NET for disparate treatment would be unwarranted and unfair. Thus, NET concludes, the Commission should not require NET to file federal tariffs and accompanying cost support materials.

V. DISCUSSION

A. Compliance with Collocation Conditions

24. Our review of NET's Compliance Plan satisfies us that it has met the requirements of the *Protocol Waiver Order*. First, NET has shown that the rates it will charge itself for interoffice channels are identical to those under which these facilities are made available to others. Second, NET has calculated a NURE and adequately explained the methodology associated with that calculation. Additionally, it has included the NURE as an unbundled rate element in its tariff filing.[24] Finally, NET has shown that it will provide end users with access to NET's protocol conversion capabilities and those of other vendors on comparable terms. Telenet, the only commenting party, agrees that NET has satisfied the requirements of the *Protocol Waiver Order*. We are therefore satisfied that NET has met the three collocation conditions of the *Protocol Waiver Order*.

B. Other Matters

25. Telenet argues that NET should not be permitted to file a federal tariff that incorporates by reference its state tariff for Infopath service, and also relieves NET from filing cost support material.[25] Although NET initially proposed to cross reference the Massachusetts tariff, it filed, on September 2, 1988, an interstate tariff for its Infopath service. The filing of this tariff moots Telenet's concern about NET's proposed tariff cross-referencing.[26]

26. As noted above, the Commission stated in the *Computer III Phase I Reconsideration Order* that the *Computer III* requirements would be waived if they follow the terms and conditions of *Computer II* waivers. The Compliance Plan closely corresponds to that approved for New York Telephone. Thus, we waive the *Computer III* requirements for NET's proposed offering.

VI. CONCLUSIONS

27. We conclude that NET's Compliance Plan satisfies the requirements of the *Protocol Waiver Order*. Thus, we accept NET's Compliance Plan subject to the determinations reached herein.

VII. ORDERING CLAUSE

28. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i) and 154(j), that the Compliance Plan of NET IS APPROVED, subject to the determinations reached herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Petitions for Waiver of Section 64.702 of the Commission's Rules and Regulations, 100 FCC 2d 1057 (1985) (*Protocol Waiver Order*).

[2] Section 64.702 (a) of the Commission's rules, 47 C.F.R. Section 64.702 (a) states:

> For the purpose of this subpart, the term "enhanced service" shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under Title II of the Act.

[3] Amendment of Section 64.702 of the Commission's Rules and Regulations (*Third Computer Inquiry*), 104 FCC 2d 958 (1986) (*Computer III Phase I Order*), *recon.* 2 FCC Rcd 3035 (1987), *further recon.*, FCC 88-9 (released February 18, 1988), *Computer III Phase II Order*, 2 FCC Rcd 3072 (1987), *recon.*, FCC 88-10 (released February 18, 1988), (*Computer III Phase II Reconsideration Order*).

[4] *Computer III Phase I Reconsideration Order*, 2 FCC Rcd at 3048, para. 86 n.161.

[5] For example, the NET Compliance Plan is very similar to the New York Telephone Company Compliance Plan, which we approved in 1986. *See* note 22, *infra*.

[6] Petitions for Waiver of Section 64.702 of the Commission's Rules (*Computer II*), FCC 84-561 (released November 28, 1984) (*X. 25 - X. 75 Order*).

[7] *Protocol Waiver Order*, 100 FCC 2d at 1112.

[8] *Id.* at 1090.

[9] *Id.*

[10] *Id.* at 1089-90.

[11] *Id.* at 1099-1101.

[12] *See* Separation of Costs of Regulated Telephone Services from Costs of *Nonregulated Activities*, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *recon.* 2 FCC Rcd 6283 (1987), petitions for further recon. pending.

[13] *See* note 20, *infra*.

[14] *Protocol Waiver Order*, 100 FCC 2d at 1093-95.

[15] *Id.* at 1107-09.

[16] *Id.* at 1095. In the Computer III Phase II *Reconsideration Order, supra* note 3 at paras. 35-39, the Commission removed the NURE requirement.

[17] *Protocol Waiver Order*, 100 FCC 2d at 1109-12.

[18] *Id.*

[19] *Id.* at 1104-07.

[20] On August 4, 1987, NYNEX, the parent company of NET and New York Telephone Company, filed a cost manual on behalf of its telephone operating companies. The manual included, among other things, proposals for allocating the costs and revenues of regulated services from those of nonregulated services, including protocol conversion. The Common Carrier Bureau approved NYNEX's cost manual, subject to certain conditions and the filing of further information. *See* NYNEX Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, *Memorandum Opinion and Order*, AAD 7-1678, 3 FCC Rcd 81 (1988). The accounting for NET's protocol conversion services is subject to any further action on NYNEX's cost manual.

[21] Compliance Plan at 10-13 and Attachment D.

[22] Compliance Plan at 13-16 and Attachment F.

[23] *See* New York Telephone Petition for Waiver of Section 64.702 of the Commission's Rules (Computer II), *Memorandum Opinion and Order*, AAD 5-1242, Mimeo No. 6782 (released September 11, 1986).

[24] Although NET has calculated a NURE and included it as an unbundled tariff rate element, the NURE requirement has been removed. *See* note 16, *supra*.

[25] On November 24, 1987, we waived Sections 61.74 and 61.38 of the Commission's Rules to allow NET to incorporate the Massachusetts state packet switching tariff into its federal tariff. Thus, NET initially proposed to use the rates, regulations and other provisions of the state tariff to govern its offering of interstate packet switching. *See* Letter from Chief, Tariff Division, Common Carrier Bureau, to Executive Director, Federal Regulatory Matters, NYNEX, dated November 24, 1987.

[26] On September 1, 1988, we granted NET a waiver of Section 61.58 of the Rules so that NET could file its Infopath interstate tariff on not less than one day's notice. We also waived the cost support filing requirements set forth in Section 61.38 of the Rules. *See* Letter from Chief, Tariff Division, Common Carrier Bureau, to Executive Director, NYNEX Government Affairs, dated September 1, 1988. No party has objected to that action or to the adequacy of NET's September 2 tariff filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 87-24

In the Matter of

Amendment of Parts 73 and 76
of the Commission's Rules
Relating to Program Exclusivity
in the Cable and Broadcast Industries

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: October 13, 1988; Released: October 21, 1988

By the Commission: Commissioner Quello concurring in part and issuing a statement.

INTRODUCTION

1. The *Notice of Inquiry and Notice of Proposed Rule Making* (*Notice)* in this proceeding addressed three related matters concerning the ability of television broadcasters to purchase exclusivity rights from program suppliers: cable syndicated exclusivity rules; cable network non-duplication rules; and broadcast non-network territorial exclusivity rules.[1] On May 18, 1988, the Commission adopted a *Report and Order* (*Report and Order)* that reinstituted cable syndicated exclusivity rules and modified the existing network non-duplication rules.[2] However, the Commission found that the commenting parties had focused only limited attention on the territorial exclusivity rule and therefore concluded that it was desirable to seek additional comment and information before acting on any major changes to this rule. In this *Further Notice*, we request information to develop a more comprehensive record on which to base our decision whether to retain, modify, or eliminate the non-network territorial exclusivity rule.

2. In the *Report and Order*, the Commission also indicated that it intended to study further the question of the geographical extent of the cable syndicated exclusivity rules and the network non-duplication rules in the context of its further exploration of the broadcast territorial exclusivity matter. In addition, the Commission identified several new issues relating to program exclusivity that were not addressed in the *Notice*. These include the applicability of the exclusivity rules to noncommercial educational television stations, low power television (LPTV) stations, and television translators. Further, we believe that it is appropriate to consider whether to eliminate the network territorial exclusivity rule which involves similar issues, but was not included in the initial *Notice* in this proceeding. In this *Further Notice*, we discuss each of these issues and request interested parties to submit comment and information thereon.

BACKGROUND

3. The Commission's primary action in the *Report and Order* was to re-establish syndicated program exclusivity rules. The new syndicated exclusivity rules, which are set forth in Sections 76.151-161 of the rules,[3] permit broadcast television stations to bargain for enforceable exclusivity rights to non-network, or "syndicated," programming as against distant signals imported by cable systems. Where a station has obtained such exclusive rights, it may request that a cable system delete such programming when it is carried by any broadcast signal carried by a cable system. Under the new rules, such rights may be obtained by a television station either on a national basis or to the same extent the station has purchased so-called territorial exclusivity. However, a station may not obtain syndicated exclusivity protection against another signal if such signal is considered significantly viewed in the cable community or places a Grade B signal over the cable community.

4. The Commission also modified the existing network non-duplication rules, which provide that a station is entitled to exclusivity for the network programming it broadcasts against the importation of the same network program on certain network signals carried by a cable system. The revised rules, which are set forth in Sections 76.92-97 of the rules,[4] provide that a television station may purchase (or may obtain) exclusivity protection against other network stations on all cable community units within the thirty-five mile geographic zone around its community of license. Furthermore, it allows all smaller market stations, *i.e.* stations in markets ranked below the top 100 markets, an additional twenty miles of exclusivity protection. The rule does not permit a station to request the deletion of duplicating network programming carried by a television station that is considered significantly viewed in the cable community pursuant to Section 76.54 of the rules.[5] Prior to the adoption of the *Report and Order*, stations were entitled to network non-duplication protection only in cases where the network programs were broadcast simultaneously on the local and distant signals. The modification to the rule removed this limitation to permit exclusivity protection over any time period specified in the contractual arrangement between a network and its affiliate.

5. With regard to its proposal to eliminate Section 73.658(m),[6] the non-network territorial exclusivity rule, the Commission concluded that it was appropriate to postpone action on whether to eliminate or modify the basic territorial exclusivity rule pending the compilation of further information through this *Further Notice*. Accordingly, the Commission retained the existing non-network territorial exclusivity rule which was intended to ensure that stations in smaller communities located near larger markets, or in overshadowed or "fringe" markets, have access to a larger pool of non-network programming.[7] This rule prohibits a television station from entering into a contract or arrangement with a non-network program producer, distributor, or supplier which precludes another television station located more than thirty-five miles away from obtaining the broadcast rights to the same programming. An exception is provided in the case of hyphenated markets where more than one city is considered part of the same television market (*e.g.*, Dallas-Fort Worth). Where a station is licensed to a community considered part of hyphenated market, that station may secure non-network territorial exclusivity against a station licensed to another designated community of the same hyphenated market.[8] However, in the *Report and Order*, the Commission modi-

fied the territorial exclusivity rule in one respect to make it consistent with the decision to reinstitute syndicated exclusivity rules. This revision permits television stations to acquire national exclusivity rights for the exhibition of non-network programming against all other stations. The Commission concluded that this change will not affect the operation of the rule with respect to its intended purpose of ensuring the availability of non-network programming to stations located in smaller markets and fringe markets located near larger markets.

NON - NETWORK TERRITORIAL EXCLUSIVITY

6. In the *Notice*, we stated that, in light of the apparent limitations the territorial exclusivity rule imposes on contractual relationships between broadcast stations and program suppliers, changes in the marketplace, and several pending requests for waiver of its provisions, it would be consistent with the other aspects of this proceeding to reevaluate the need for this rule.[9] In addressing this matter, we asked for comment on three general issues: 1) the desirability of relying on competitive market forces to guide program exclusivity arrangements; 2) the effect of changes in the market on the need for the rule; and 3) the practicality of a general rule. We also asked for comment on possible modifications to the geographic limits set by the existing rule. In this *Further Notice*, we review our initial assessment of the merits of the territorial exclusivity rule with regard to each of these issues, summarize the comments received in response to the *Notice*, and indicate the additional information we seek relating to points raised in those comments. Interested parties are invited to comment on the full range of issues regarding the territorial exclusivity rule, including the specific issues addressed in this *Further Notice* and also those raised in the *Notice*. We intend to consider the need for the rule, in general, and the expected effects of its possible elimination or modification on the overall television service provided to the public.

Review of the Notice and Summary of the Comments

7. *Competitive Market Forces.* In the *Notice*, we stated that competitive market forces appear better suited to further the public interest with respect to the non-network program territorial exclusivity matter than the existing rule. We believe that this is the case because the affected parties appear to be in a better position than the government to determine the arrangements which will serve the viewing public best. We observed that a station's willingness to pay for exclusivity reflects the judgment that duplication by other stations of the same program within the same market will reduce the audience value of the program to the originating station. We also indicated that because the purchase of significant exclusivity rights can represent a substantial expense, stations would not be expected to bargain for more exclusivity than necessary to serve their market or for more programs than they intended to air. Additionally, we stated that it appears that the rule may artificially inhibit the incentives to produce and air programs and, therefore, may not be in the best interest of the viewing public. We requested comment on these issues and whether the antitrust laws, or other mechanisms, might be sufficient to prevent abuses in the absence of regulatory limits on territorial exclusivity arrangements.

8. Parties supporting elimination of the non-network territorial exclusivity rule submit that this rule arbitrarily limits the extent of geographic protection a television broadcaster can secure through negotiations with program suppliers. These commenters state that elimination of the rule would permit each station to protect its competitive market area through exclusivity agreements with program distributors that are tailored to the realities of its market. Chris-Craft Industries and United Television (Chris-Craft) also state in joint reply comments that if the goal is to maximize the public benefit by permitting the market to operate freely, then stations and program suppliers should be allowed to contract for as much exclusivity as needed.

9. Commenters supporting elimination of the rule also agree with our initial assessment that stations would not purchase more exclusivity than would be worthwhile, nor would they purchase exclusivity for programming they would not use. The National Broadcasting Company (NBC) points out that the economics of the syndication business today are such that it would prove too costly for any station to buy the rights to broadcast any significant number of programs and then not broadcast them merely in order to foreclose a competitor from having access to such programming. Several commenters favoring elimination of the rule submit that the antitrust laws are sufficient to deal with anticompetitive problems which might arise in the absence of Commission regulation.

10. Parties that favor maintaining the existing rule argue that it has helped maintain competition among stations and that its elimination would adversely affect the viability of some stations, particularly UHF independents and stations in fringe markets overshadowed by large market stations. These commenters contend that the original justification for the territorial exclusivity rule remains valid. They submit that the rule has corrected the market imperfections resulting from the inherent inequalities between small and large stations and between UHF and VHF stations, and from the channel assignment process as reflected in the Table of Allocations. Many commenters attribute the ability of smaller stations, newer stations, stations with more limited coverage areas, and stations in smaller television markets to compete to the existence of this rule.

11. Supporters of the rule claim that it does not unduly limit the contractual freedom of program suppliers and broadcasters, but rather places a reasonable check on the exercise of market power of large market stations with respect to program suppliers that would result in small stations being deprived of quality syndicated programming. Southern Broadcasting of Sarasota (Southern) submits that, contrary to our assessment in the *Notice*, in the absence of the rule large market stations would bargain for the maximum amount of exclusivity available. Southern, WTMJ, and KNTV contend that we overestimated the marginal cost of expanded territorial exclusivity for large market stations. They also argue that because of the importance of selling a program or program package to stations in the largest markets, program suppliers would likely be willing to extend the boundaries of exclusivity to large market stations at little or no extra cost. Furthermore, these parties claim that, even with the rule in place, program distributors have been reluctant to deal with them for fear of jeopardizing their lucrative deals in nearby major markets.

12. The Motion Picture Association of America (MPAA) submits that the rule does not inhibit the production of syndicated programming. It states that the production of new programming is driven by the availability of viable outlets for the programming. According to MPAA, any rule change that would weaken financially a significant number of broadcast stations would tend to reduce the number of potential purchasers of such programming. MPAA states that with fewer financially sound stations competing for program rights, the market for syndicated programming would shrink, the incentive to invest in new programming would diminish, and the opportunities for new entrants in the syndication market also would diminish.

13. The National Association of Broadcasters (NAB) and several other commenters opposing the elimination of the non-network territorial exclusivity rule argue that the antitrust laws are unlikely to be satisfactory for preventing abuses or remedying the potential injuries that would be caused by the elimination of the rule. They submit that antitrust litigation is notoriously expensive and protracted and that the stations most likely to be harmed are those least likely to be able to afford such litigation. Additionally, they claim that reliance on the antitrust laws to resolve disputes or to determine whether exclusive territories are reasonable under these laws would be disruptive to time sensitive transactions.

14. *Changes in the Market.* In the *Notice*, we observed that the video marketplace, particularly the broadcast television sector, has experienced significant increases in the number of programming outlets and sources of programming since the non-network territorial exclusivity rule was adopted in 1973. Specifically, we indicated that the total number of television stations has increased and that this growth has been distributed across all television markets. We also observed that the economic health of UHF stations in particular appears to have improved over the time period that the rule has been in effect. We indicated that the improved viability of such stations would seem to provide them with a greater ability to negotiate for non-network programming. We further noted that the new video distribution technologies, such as multi-channel multi-point distribution systems and expanded cable service, that compete with conventional broadcast stations for programming are not subject to a regulatory restriction such as the territorial exclusivity rule. We stated that it appears that the territorial exclusivity rule prevents broadcast television stations from competing for program rights similar to those available to other video services. Finally, we observed that in view of the greater availability of syndicated programming today, it appears unlikely that the occasional inability of a station to obtain a specific program would prevent it from obtaining good alternative programming.

15. Comments addressing the effects of changes in the competitive marketplace over this period were rather limited, especially from parties supporting elimination of the rule. In fact, with the exception of a few parties stating that elimination of the non-network territorial rule would enable television stations to compete on a more even footing with other video services that are not subject to this rule, no comments were received on this issue from those favoring repeal of the rule.

16. A primary concern of the commenters opposing elimination of the territorial exclusivity rule is that, in the absence of the rule, large market stations would use their greater financial and economic power to obtain exclusivity rights such that nearby small market stations would be precluded from obtaining necessary programming. A number of these parties express concern that in the absence of the rule, already-disadvantaged stations that commenced operation with the expectation of continued non-network territorial exclusivity protection, could lose their ability to obtain popular programming critical to their competitive viability. These commenters also argue that revenues earned through broadcast of popular programming are essential not only for their basic viability, but also for the production of local news and public affairs programming to serve the interests, concerns, and desires of the smaller communities to which they are licensed. Thus, they claim that if the rule is eliminated local service would be either diminished or eliminated. Additionally, they contend that it is unlikely that the larger market stations would make a corresponding commitment to local news and public affairs coverage in those smaller markets to replace lost service.

17. Several of the parties supporting retention of the current rule disagree that economic circumstances have changed such that the interests of smaller stations no longer need the protection afforded by the non-network territorial exclusivity rule. In particular, Southern disagrees with our initial assessment of the financial health of UHF stations. It claims that the NAB data cited in the *Notice* to indicate the health of UHF stations is incomplete because the sample in that study is likely to represent only the most profitable stations that can afford to support participation in broadcast associations. Maranatha Broadcasting Company (Maranatha) states that the success of these smaller stations is not a reason to abolish the rule, but instead indicates the continuing need for reasonable limitations on geographic exclusivity to maintain the success of local stations. It also comments that smaller market stations located near larger market stations have a built-in disadvantage because their potential audiences are smaller and that elimination of the rule could destroy the viability of smaller, independent stations and thereby eliminate the competition that the Commission contends exists.

18. Commenters agree with our assessment that, quantitatively, more non-network programming is available now than when the rule was adopted. However, many parties disagree with the qualifying adjectives "good alternative." Southern explains that from the broadcaster's point of view, one program is an effective substitute for another only if it generates the same audience and thereby produces comparable revenue. It states that there are only a limited number of "hit" syndicated programs. Thus, Southern claims that, in the absence of the rule, an overshadowed market station would likely be forced to choose among the least popular programs given that it generally faces competition from several stations in the overshadowing market. As an illustration of this point, Southern observes that Nielsen Syndicated Service audience data indicate that a station forced to take the second most popular syndicated show instead of the first would average a 19 percent ratings drop, and that a station that had to resort to the number 15 ranked program would experience a drop in audience of 71 percent. Most of the supporters of the rule fear that if it were eliminated, small stations would be forced to purchase exclusivity at large market prices and therefore might be precluded from purchasing the desired programs at all. Finally, in reply comments, Tribune Broadcasting Company (Tribune) disagrees with

our statement that the rule may be inefficiently encouraging copyright holders to exhibit their programming over nonbroadcast media because the current rule permits a program distributor to reach virtually the entire country on a market-by-market basis.

19. *The Practicality of a General Rule.* In the *Notice*, we indicated that there appear to be practical difficulties with a general territorial exclusivity restriction such as imposed by the existing rule. We observed that there are a wide variety of factors which could be expected to bear on an individual station's desire for territorial exclusivity protection and the extent to which a station would seek such protection. We indicated that the factors a station might be expected to consider in this regard include the competitive structure of the market as determined by the number and types of competing stations, the difference in populations served by the individual stations, the programming carried by other stations, the geographic location, and the terrain conditions of the area served by the stations. Stations would also be expected to consider the program elements of quality, cost, and profitability. We also observed that the degree of exclusivity desired by a station could be expected to vary across programs, markets, and stations. We tentatively concluded that our general rule governing non-network program exclusivity may be impractical in that it does not allow for such considerations in the need for station to station territorial exclusivity protection and thus may create artificial markets that do not represent the actual competitive reality that any given station faces.

20. In this context, we also requested that commenters consider the possibility of modifying the existing rule, rather than eliminating it, by changing the territorial exclusivity limits to some specified area other than the current 35-mile zone. We sought comment on whether a modified rule could be developed that would more realistically reflect competition among television stations for non-network programming and would be more practical than the existing rule in promoting the public interest. Further, we requested comment on the disposition of the Commission's table of major television markets, Section 76.51, which has been used to determine the designated communities considered part of the same hyphenated television market for the purpose of applying this rule.

21. The parties supporting elimination of this rule generally agree with our initial assessment that the rule is impractical in that it sets one geographic zone for all markets. These parties believe that stations should be able to purchase as much exclusivity as they are willing to pay for and that such an ability would permit them to obtain exclusivity that more realistically reflects the effective coverage patterns of their stations and markets, rather than force a 35-mile zone on all situations. Capital Cities/ABC (Cap Cities) also notes the complexity of determining the proper amount of exclusivity needed in each case and states that it is appropriate to leave such decisions to stations, advertisers, and program suppliers whose understanding of the boundaries of individual markets is better than that reflected in such viewer survey categories as Arbitron's Area of Dominant Influence (ADI) or the A.C. Nielsen Company's Designated Market Area (DMA).[10]

22. Commenters favoring retention of a territorial exclusivity rule argue that it is not impractical. While acknowledging that the 35-mile zone is somewhat arbitrary, Tribune argues that by quantifying the maximum allowable exclusivity protection, the rule offers both parties to a program-buying transaction predictability and certainty. KNTV submits that the rule, in combination with limited waivers that take into account unique situations, has fostered the goals of promoting complete television coverage, program diversification and furthering the economic viability of television stations serving smaller communities on the fringes of larger markets, thus allowing a wide variety of programming to be available in both large and small markets. KNTV also argues that the fact that only a few waiver requests have come before the Commission indicates that the rule fits the regulatory goals of the Commission and the competitive realities of the television industry well.

23. Several commenters supporting retention of the rule propose modifications to the 35-mile zone in order to define a station's actual market better. These parties propose alternative approaches to the 35-mile zone such as the Arbitron ADI or Nielsen DMA market definitions or the predicted Grade B contour[11] of the broadcast station purchasing the program. They argue that these areas would better represent a station's market or its service area. Several commenters argue against changing the zone for exclusivity protection, generally on the grounds that widening the zone would cause many overshadowed markets to be subsumed by larger nearby markets. Finally, one commenter, WMUR-TV, addressed our proposal to update the list of television markets in Section 76.51 of the rules that applies to the non-network territorial exclusivity rule. WMUR-TV, a fringe market station, opposes any change that would make fringe markets part of hyphenated markets that also include the nearby larger market. It states that such action would result in the elimination of territorial exclusivity rights for stations located in overshadowed markets.

Discussion

24. We continue to believe that market forces generally are a more effective and efficient means for directing stations in the acquisition of program exclusivity against other broadcast stations than government regulation. However, we are aware of the statements of many of the commenting parties that the territorial exclusivity rule has in fact helped to promote competition in broadcast markets and, by furthering the viability of otherwise less desirable channel assignments, has served to increase diversity and choice for viewers, particularly those residing just beyond the service areas of central market television stations. While we generally do not consider it desirable to adopt policies that favor any particular broadcast station or class of station, we are concerned about the effect any action we might take in this matter would have on the overall service to public.

25. We seek additional comment and information concerning the impact of the existing rule on the efficient functioning of the program supply market and the service provided to viewers by television. Interested parties are asked to address the need for program exclusivity against other nearby broadcast stations, particularly those located on the fringes of their service areas. We also seek specific information on the extent to which the territorial exclusivity rule may cause stations to enter into less desirable exclusivity agreements than they might otherwise negotiate.

26. On the other side of this matter, we intend to investigate further the beneficial effects the rule may have on the functioning of the program supply market. We

wish to obtain more information on the point discussed by many commenters that the rule helps to correct the market imperfections reflected in the inherent differences in station competitive positions that result from the assignment process. In this regard, we note that these commenters generally claim that the viability of many stations would suffer in the absence of the rule. We request information on whether the viability of stations, particularly those located in smaller markets located near larger markets and in fringe markets, would be adversely affected by the elimination of the territorial exclusivity rule. Commenters also are asked to indicate the number of stations that would be affected.

27. A second program market consideration we desire to explore further is the relative bargaining power of stations serving larger markets and those serving nearby smaller or fringe markets with respect to program suppliers in negotiating for exclusivity. We request information on the pricing policies of program suppliers with respect to exclusivity and on the extent to which the price of exclusivity may be discounted or increased for stations serving markets of differing sizes.

28. We are particularly interested in obtaining additional information relating to MPAA's position that the existence of the rule, in fact, encourages the production of syndicated programming, rather than limits it as we suggested in the *Notice*. MPAA does not provide detailed discussion or analysis on this point to indicate why our initial assessment that the rule appears to have an inhibiting effect on program production is incorrect. Interested parties are asked to comment on MPAA's position and to submit other information relating to the effect of the territorial exclusivity rule on production of broadcast programming. We also seek additional information regarding the effect of the rule on copyright owners in their decisions to market programming to broadcast or non-broadcast media.

29. As we discussed in the *Notice*, the television industry has undergone significant changes since the territorial exclusivity rule was adopted in 1973. Thus, we request additional comments regarding whether it is still necessary and desirable to maintain the territorial exclusivity rule for the purpose of ensuring or furthering the viability of some stations, especially in view of the fact that this rule directly limits the contractual economic rights of other stations in a manner that may affect viewer choices.

30. With regard to the effect of the rule on the increased availability of television programming, we note that several commenters, especially Southern Broadcasting of Sarasota, submit that while, in general, more programs are available, there remains a scarcity of programming with high audience appeal. These stations claim that fringe and overshadowed market stations would not be able to obtain satisfactory programming in the absence of the rule. We request additional discussion, factual data, and analysis on the supply of programming with high audience appeal. We are particularly interested in information as to: 1) the relative difference in the appeal of top ranked non-network programs and other programs; 2) the extent to which such programming is important to the competitive efforts of nearby market and fringe market stations; 3) the extent to which such programming is purchased by those stations under the current regulatory scheme; and, 4) the extent to which top-ranked programs might not be available to viewers in the service areas of those stations as a result of the exercise of exclusivity rights if the rule were eliminated. Further, we request comment regarding the effect that the inability of some stations to obtain the most popular programming, if that were indeed the case, would have on those stations and their viewers.

31. We also seek additional comment on whether the rule places broadcast stations at a competitive disadvantage with respect to other video media that are not subject to territorial exclusivity restrictions. In the *Notice*, we expressed concern that the restrictions placed on broadcasters by this rule might have the effect of encouraging program suppliers and producers to shift some programming and/or program production efforts to cable and other media. We observed that none of these other video media is subject to geographic or any other form of artificial limitation on the amount of program exclusivity they may purchase. While the existing record in this proceeding does not provide direct evidence on this point, we observe that recently several syndicators have decided to market off-network television programming directly to cable services rather than to broadcast stations.[12] Therefore, we request that commenters consider whether the rule places broadcasters at disadvantage in competition with cable systems, and other participants in the video distribution market, for programs by limiting their ability to reach as wide an audience as possible with a program.

32. As we observed in the *Notice*, there are a wide variety of factors which influence an individual station's desire and need for exclusivity protection with respect to non-network programs. In general, the profitability of programs depends on their audience appeal, their price, and the competitive elements of the station's market. The elements affecting the competitive position of stations in a market include such factors as the number of stations competing in the market, the differences in the populations served by the individual stations in the market, the programming that is carried in the same and adjacent time periods by other stations, and the geographical location and terrain conditions of the areas served by stations in the market. In addition, different economic circumstances are encountered by network affiliated and independent stations and UHF and VHF stations. We invite additional comment on the practicality of territorial exclusivity limits and proposals for modifying the rule to conform more closely to actual market situations.

33. We also are interested in the impact elimination or modification of the rule might have on certain segments of viewers. The existing record provides little information on the effect that elimination or modification of the rule would have on populations located in the portions of a smaller market or fringe station's service area that are not served by the larger or central city station (*i.e.*, populations located in the non-overlapping portions of the fringe station's service area). We request comment and specific factual information on the extent to which populations residing in such areas would be disadvantaged vis-a-vis other television viewers if the territorial exclusivity rule were modified or eliminated. We seek this information in terms of the absolute number of affected viewers and the proportion such viewers represent of the total number of viewers within the central market.

34. In particular, we ask commenters to consider whether a rule based on a wider zone than the existing 35-mile geographic area would provide a balance between competing interests by permitting parties to negotiate with more flexibility where it is appropriate and providing for the needs of overshadowed market stations and the populations they serve, especially in areas not reached by larger

market signals. We request that parties supporting modification of this rule, rather than its elimination, comment on the implications of expanding the limits of exclusivity to another geographic area, such as the predicted Grade B contour, Arbitron's ADI, Nielsen's DMA, or a larger than 35-mile geographic area (*e.g.*, 50, 70, or 100 miles). In doing so, parties should consider the impact that any modification of the geographic limits would have on the competitive environment among television stations and any possible benefits derived from lessening the restrictions placed on exclusivity agreements. For example, we observe that each station's predicted Grade B contour, which the Commission generally considers to indicate a station's primary service area, is determined principally by its power and antenna height such that the signals of stations licensed to the same community often have very different coverage areas. Thus, a VHF station whose Grade B contour can sometimes extend as far as 70 miles would be entitled to a greater degree of exclusivity than its UHF competitors licensed to the same community and also would be likely to obtain exclusivity over fringe markets. However, we note that the geographic area of the Grade B contour generally is considered a good approximation of a station's signal coverage area. Alternatively, a specified mileage zone larger than the existing 35-mile zone might provide a reasonable and workable means to represent the average station's service area for this purpose. We further observe that the market areas defined by the ratings services, the ADI and DMA, while readily available, are intended to serve the needs of the clients of these organizations. Therefore, the use of these geographic areas may not be appropriate for our purposes because they are determined by the strongest station licensed to a market, vary from year to year, often combine fringe markets with the nearby larger markets, and involve assigning each station on an exclusive basis to a market, making it impossible to account for stations that may compete for audience in more than one market.

35. The final issue we are addressing in regard to the territorial exclusivity rule is the possible need to modify the list of television markets specified in Section 76.51 of our rules. This list of the top 100 television markets was derived largely from Arbitron's 1970 prime time household rankings. Its principal use now is to identify the hyphenated markets and the communities included in those markets.[13] Parties supporting retention of the existing rule or a modification of it that necessitates the maintenance of a list of market designations are asked to comment on the matter of the relevance of the current market list. The principal question we wish to consider in deciding whether to amend the list herein is whether it has become outdated in view of the many new television stations that have commenced operation since the list was incorporated in our rules. In view of this development, we believe that it may be appropriate to update the list of television markets applicable to this rule to reflect current market designations. It may be desirable to separate existing hyphenated markets into individual markets in many instances, although there also may be some situations where new communities should be added to the existing market designations. We request comment on these matters with respect to modifications to the list of television markets specified in Section 76.51 of our rules.

36. Commenters on this matter also should consider the fact that a comparison of the list of markets in Section 76.51 with Arbitron's current list of top 100 ADI markets indicates that 11 markets included in the original list are no longer ranked in the top 100 markets.[14] Of the markets that appear on both lists, the designated communities of 23 markets differ between the two lists. Further, we observe that in 18 cases where the market names differ, our list includes communities in hyphenated markets not included by Arbitron in its recent list of top 100 markets. We also wish to point out that our original list of markets was not identical to Arbitron's market designations at the time it was incorporated into the rules. For example, our market list in Section 76.51 used New York-Paterson-Linden- Newark instead of the designation New York, as Arbitron did in 1970. Further, while Arbitron continues to designate the top ranked market New York, it lists stations licensed to each of the following communities within that market: New York, New York; Bridgeport, Connecticut; Newark, New Jersey; Patchogue-Hempstead, New York; Riverhead, New York; Garden City, New York; Montclair, New Jersey; Linden-Newark, New Jersey; Poughkeepsie, New York; Secaucus, New Jersey; and Paterson, New Jersey. Thus, we seek commenter guidance regarding the use of Arbitron's list of market designations for the application of the territorial exclusivity rule.

37. In addition, we ask that parties addressing this matter consider the other uses of the top 100 market list and the impact any changes to this list might have on the implementation of other rules. We observe that the list of markets also affects stations' exclusivity rights under the existing syndicated exclusivity and network non-duplication rules. We further note that the existing copyright laws require cable operators to pay royalty fees for the carriage of distant signals.[15] For copyright purposes, local signals not subject to copyright payments are determined by definitions based on our former must carry rules.[16] Under those rules, any signal licensed to a designated community of a hyphenated market had carriage rights within all named communities of such a market. Thus, we believe that it is important for commenters to consider the implications of any proposed changes to our list of markets.

OTHER MATTERS

38. In the *Report and Order*, we stated that we would further consider the geographic limits for the new syndicated exclusivity rules and the revised network non-duplication rules in the context of our further consideration of the territorial exclusivity rule. We also stated that we would provide parties with opportunity to comment further on several issues that might lead to refinements of these rules. In this section, we discuss modifying the geographic limits in the syndicated exclusivity and network non-duplication rules, including the possibility of adopting a consistent set of limits for all of the program exclusivity rules, and modifying all of these rules so that they apply uniformly to all types of television stations and programs. In addition, we seek comment on the network territorial exclusivity rule, Section 73.658(b), which was not previously included in this proceeding. As explained below, this rule addresses issues similar to those raised herein with regard to other exclusivity matters and it appears reasonable to consider this rule in this *Further Notice*.

Network Territorial Exclusivity Rule

39. Section 73.658(b) of the rules provides, *inter alia*, that no television station may have a contract, arrangement, or understanding with a network (under the broad *Chain Broadcasting Report* definition[17]) which prevents or hinders another broadcast station located in a different community from broadcasting any program of the network organization.[18] This provision of the network territorial rule limits the exclusivity a television station may acquire for the exhibition of network programming vis-a-vis stations licensed to other communities. In this regard, we believe that this rule and the issues it raises are similar to the questions being considered in this *Further Notice* concerning other exclusivity matters. Thus, we believe that it is appropriate to consider elimination or modification of the provision of this rule which prohibits network exclusivity agreements against stations licensed to other communities.

40. This rule limits the ability of network affiliates to contractually determine the appropriate geographic area for such exclusivity arrangements and to negotiate their affiliation agreements accordingly. This rule may place unnecessary regulatory restrictions on such agreements that might be better left to the marketplace. We believe that the private parties involved may be in a better position than the government to assess the coverage of individual television stations in order to determine market boundaries for the purpose of network program distribution. We have no reason to believe that the public would be deprived of network program service, if we were to eliminate this portion of Section 73.658(b), as it appears that the intent of the networks is to maximize the coverage of their programming. We request comment on the possibility of eliminating the second provision of this rule or modifying it in a manner consistent with our other rules pertaining to the acquisition of program exclusivity. In particular we ask that commenters consider the impact that elimination or modification of the rule would have on the ability of stations to acquire network programming and on the availability of such programming to viewers.

Development of a Consistent Set of Exclusivity Rules

41. We intend to give careful consideration to the option of adopting a consistent set of program exclusivity rules for network and non-network programming carried by over-the-air television stations and cable systems. In particular, we believe that it is appropriate to consider modification of the geographic limits for the network territorial, cable syndicated, and network non-duplication exclusivity rules in the same context that we address possible modifications to the non-network territorial exclusivity rule to develop a consistent policy across all of these rules. We note, as discussed above, that the new cable syndicated exclusivity rules permit a television station to exercise cable syndicated exclusivity rights within the same geographic areas as set forth in the existing non-network territorial exclusivity rule (*i.e.*, 35-miles around its community of license or nationwide). The network non-duplication rule allows television stations to purchase up to 35 miles of exclusivity protection against network programming in the top 100 markets and up to 55 miles in other markets. Furthermore, both of these rules prohibit stations from exercising exclusivity rights against other signals that are significantly viewed in the relevant cable community and, additionally, the new syndicated exclusivity rules ban exclusivity against other stations placing a Grade B signal over the cable community. On the other hand, the network territorial rule places restrictions on program exclusivity arrangements based on the station's community of license rather than a consistent specified geographic zone for all stations. We do not believe that our program exclusivity rules should differentiate between program types and distribution technologies. Thus, we propose to modify each of these rules consistent with any changes we decide to make to the non-network territorial exclusivity rule. We invite comment, information, and analysis on this proposal.

42. One option would be to remove all geographic limits from the syndicated and network non-duplication rules if we determine that elimination of the network and non-network territorial exclusivity rules is appropriate. Such action would provide a parallel and consistent set of exclusivity rules for network and syndicated programming distributed either over-the-air or by cable. It would permit total freedom for broadcasters and program suppliers in negotiating exclusivity agreements for program exhibition rights. Alternatively, we could decide to modify the non-network territorial exclusivity rule to permit exclusivity arrangements to cover a wider geographic area than is allowed under the current rule. If so, we might want to alter the network territorial, syndicated exclusivity, and non-duplication rules accordingly. We request comment and discussion regarding the possibility of modifying these rules to increase the geographic zone applicable to exclusivity protection to the areas discussed above with respect to non-network territorial exclusivity. We will also consider any other geographic areas proposed by commenting parties beyond the above-mentioned. Further, we seek comment on any exceptions to a geographic standard which should be included in any revised rules we adopt, such as the current exemptions for significantly viewed and Grade B signals.

Stations Entitled to Exclusivity

43. The four exclusivity rules under consideration herein vary with respect to the types of stations entitled to exercise exclusivity rights. The network and non-network territorial exclusivity rules specified in Section 73.658 are applicable to all television stations, both commercial and noncommercial. The syndicated exclusivity rules provide that only commercial television stations may exercise syndicated exclusivity rights against other stations carried on cable systems.[19] The network non-duplication rules permit commercial and noncommercial television stations to request protection against distant signals carried on cable systems. These rules also specify that such protection may be requested by a 100-watt or higher power translator stations that is located within the predicted Grade B contour of the full service station it retransmits in the community where the translator is located. In this instance, the duplicating signal to be deleted must be licensed to a community which is more than fifty-five miles from the cable community.

44. We propose to revise each of the program exclusivity rules such that all stations covered by the scope of our television rules are entitled to bargain for and exercise program exclusivity against other broadcast stations that may be available either over-the-air or through cable carriage.[20] That is, we believe that it is appropriate to extend the exclusivity rights of the existing rules, including any modifications made as a result of this proceeding, to all station types including commercial, noncommercial, low

power, and translator stations. We see no basis for differentiating in treatment between commercial and noncommercial stations under the current syndicated exclusivity rules. We also observe that none of these rules apply to low power television (LPTV) stations. While the actual coverage area of these stations is smaller than that of full service stations and they operate on a secondary basis, they nonetheless can be expected to have the same basic need for and interest in program exclusivity as full service stations. However, because LPTV stations have smaller service areas, they may not need the same degree of geographic protection as full service stations. We request comment on whether LPTV stations should be afforded the same degree of geographic exclusivity protection as full service stations and invite proposals for the geographic area to be specified by these stations. Possible approaches would be to limit exclusivity protection for these stations to their community of license or to a fixed mileage zone such as ten miles. We request comment on all aspects of our proposal to extend the exclusivity rules to all television stations within the scope of Section 73.601 of the rules.

45. Television translators are low power stations that rebroadcast the signals of full service stations on a secondary basis.[21] These stations are intended to provide service to areas and populations that are unable to receive satisfactory service from full service stations due to distance or terrain obstructions. Under our rules, TV translators may be located within the predicted Grade B contour of the full service stations they rebroadcast or beyond that area. As rebroadcast facilities, translator stations generally do not negotiate for program rights separately from their parent full service stations. In general, we believe that stations should be permitted to exercise program exclusivity rights in the areas they serve through translators. Providing such rights would appear to strengthen the economic incentives for stations to operate translators in remote locations. We request that commenters consider whether the exclusivity rules should be extended to areas served by a full service station's translators. For example, should a station be permitted to purchase non-network program exclusivity for areas beyond 35 miles from the parent station's community of license that it serves with translators? Similarly, should a station be permitted to exercise cable syndicated exclusivity rights in areas beyond the 35-mile zone that it serves by translator? We also ask commenters to consider whether it is appropriate to limit the range of exclusivity rights for translators in the same manner as discussed above for LPTV stations. In doing so, we request that commenters consider the effect of extending such rights to services which operate on a secondary basis. Further, we request that commenters consider the implications for competition among stations that extending the exclusivity rules to translators might have as a result of allowing stations to expand the permissible geographic zone through the use of translators.

CONCLUSION

46. The actions proposed in this *Further Notice* are intended to permit us to develop a consistent set of rules and policies concerning program exclusivity matters. We believe that it is desirable to establish a regulatory policy that fosters the rights of television stations to contract for program exclusivity rights for both network and non-network programming against other television stations without government interference. We generally believe that the marketplace provides sufficient incentives to foster the provision of television service to the public in the most efficient and expeditious manner. We also wish to provide broadcasters with an opportunity to compete on an equal basis with the new video distribution technologies, including cable and multi-channel multi-point distribution service, that are not subject to restrictions on the amount of exclusivity they may purchase for the programming they distribute to television viewers. However, in considering changes to our policies as described herein, we want to consider the impact any action we take may have on the amount and diversity of television service available to the public. We invite commenters to provide us with information to assist us in developing a regulatory scheme to accomplish these goals.

REGULATORY FLEXIBILITY ACT INITIAL ANALYSIS

47. Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

I. *Reason for Action.* Examination of the non-network territorial exclusivity rule is timely because of changes in the marketplace since its adoption that seem to indicate that the rule has served its intended purpose and now may be undesirably infringing on the rights of broadcast stations to contract for exclusivity rights against other broadcast stations. By this action, we seek additional information and discussion regarding this matter. With respect to the related syndicated exclusivity and network non-duplication rules we also want to consider further the scope of the geographic limits places on broadcasters' ability to purchase such rights and whether to extend the exclusivity rules to noncommercial stations, LPTV stations, and TV translators.

II. *Objectives.* We believe that it is desirable to eliminate, whenever possible, regulations which infringe on the contractual relationships between private parties. In considering changes to the existing exclusivity rules, it is our goal to provide broadcasters with the ability to negotiate contracts with program suppliers without government interference. However, we are concerned about the impact that any action we might take in this regard might affect the quantity and diversity of programming available to the public, particular populations located in smaller markets located nearby larger markets and in areas outside of the overlapping portions of the service areas of fringe market stations. In our final action in this matter, we will attempt to balance these competing interests.

III. *Legal Basis.* Authority for action as proposed in this rule making proceeding is provided in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

IV. *Description, potential impact and number of small entities affected.* In considering elimination or modification of the territorial exclusivity rule and changes to the syndicated exclusivity and network non-duplication rules, it is our objective to balance our desire to maximize the flexibility of parties entering into exclusivity arrangements against our concern that small and fringe market stations have access to sufficient programming to serve the public. Throughout this proceeding, we have asked commenters

to carefully consider the impact that any action we may take will have on the availability of program service to the public.

V. *Reporting, record keeping and other compliance requirements*. The existing syndicated exclusivity and network non-duplication rules require broadcast stations to notify the affected cable systems in writing of such rights when they choose to exercise them. The proposals to revise the rules herein would not alter these requirements.

VI. *Federal rules which overlap, duplicate or conflict with this rule*. None.

VII. *Any significant alternatives minimizing impact on small entities and consistent with the stated objectives*. We could retain the exclusivity rules in their current form. However, modification of our rules as proposed herein may provide benefits for both large and small stations by eliminating or lessening regulatory restraints on the negotiation of program exhibition contracts between private parties.

PROCEDURAL MATTERS

48. Written comments are requested on the initial regulatory flexibility analysis. These comments must be filed in accordance with the same filing deadlines as comments on the rest of this *Further Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of the *Further Notice*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub.L.No. 96-354, 94 Stat. 1164, 50 U.S.C. §602 *et seq.*) (1982).

49. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

50. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

51. Pursuant to applicable procedures set forth in 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **December 12, 1988,** and reply comments on or before **December 27, 1988.** We wish to emphasize that, because of our desire to move quickly toward a rule making, we will be disinclined to grant extensions of time for filing comments and reply comments at this stage of the proceeding. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington D.C. 20554.

52. This Further Notice of Proposed Rule Making is issued pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

53. Accordingly, IT IS PROPOSED that Part 74 the Commission's rules be amended as discussed herein.

54. For further information concerning this proceeding, contact Marcia Glauberman, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION:

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See Notice of Inquiry and Notice of Proposed Rule Making* in GEN Docket No. 87-24, 2 FCC Rcd 2393 (1987).

[2] *See Report and Order* in GEN Docket No. 87-24, 53 FR 27167 (July 19,1988).

[3] *See* §76.151-161, 53 FR 27172, 27173.

[4] *See* §76.92-97, 53 FR 27171, 27172.

[5] *See* 47 CFR §76.54.

[6] *See* 47 CFR §73.658(m).

[7] *See First Report and Order* in Docket No. 18179, 42 FCC 2d 175 (1973).

[8] The designated communities of hyphenated markets are as specified in Section 76.51 of the Commission's rules, 47 CFR §76.51, for the top 100 markets, and as contained in Arbitron's *Television Market Analysis* for markets not listed therein.

[9] Petitions for waiver of Section 73.658(m) have been filed by: 1) Blair Broadcasting of California, Inc., licensee of KSBW-TV, Salinas, CA; 2) United Television Inc., licensee of KMSP-TV, Minneapolis, MN; 3) Chapman Radio and Television Corp., licensee of WTTO-TV, Homewood-Birmingham, AL; 4) Times Southwest Broadcasting, Inc., licensee of KFSM-TV, Fort Smith, AR; and, 5) Pappas Telecasting Inc., licensee of KMPH-TV, Visalia, CA, Retlaw Enterprises Inc., licensee of KJEO-TV, Fresno, CA, and San Joaquin Communications Corp., licensee of KSEE-TV, Fresno, CA (joint filing). We will withhold action on these requests for waiver pending our resolution of the non-network territorial exclusivity matter. To some extent each of these requests raises questions concerning whether the existing market definitions now included in the rules are correct. Comments with respect to this question are specifically invited in this proceeding. *See* discussion below.

[10] Generally, the ratings services define ADI and DMA market areas by assigning each county in the nation, on an exclusive basis, to the market whose stations receive a plurality of the audience in the county.

[11] The predicted Grade B contour for television stations is defined in Section 73.683 of the Commission's rules. *See* 47 CFR §73.683.

[12] We note that cable networks have acquired the exhibition rights for the initial off-network runs of several television program series, including *Murder She Wrote*, *Miami Vice*, and *Cagney and Lacey*. *See Broadcasting*, February 8, 1988, page 102.

[13] As specified in Section 73.658(m), hyphenated markets other than those listed in Section 76.51 are determined using Arbitron's *Television Market Analysis* (now titled the *ADI Market Guide)*.

[14] *See* Arbitron's *1987 - 1988 ADI Market Guide*.

[15] Currently before the Commission is a request for a change in market designation filed by Triplett & Associates, licensee of WWAT, Chillicothe, Ohio. The licensee is requesting that its community of license be hyphenated with the Columbus market in order to permit the cable systems within the portion of the Columbus 35-mile zone which does not overlap the Chillicothe 35-mile zone to carry its station without incurring copyright liabilities.

[16] The issue of the relationship between changes of this type in our rules and the copyright compensation mechanisms set forth in Section 111 of the Copyright Act is the subject of a proceeding pending before the Copyright Office. *See Notice of Inquiry* in Docket RM 85-2, 50 FR 14725 (April 15, 1985).

[17] *See Report on Chain Broadcasting and Order* in Docket No. 5060 (May 2, 1941).

[18] *See* 47 CFR §73.658(b). We note that are not seeking comment herein of the portion of Section 73.658(b) that provides that no television station may have a contract, arrangement, or understanding with a network which prevents or hinders another broadcast station located in the same community from broadcasting the network's programs not taken by the former station.

[19] *See* Section 76.151(a) of the rules. In joint comments filed in response to the *Notice*, the Corporation for Public Broadcasting and the National Association of Public Television Stations requested that noncommercial educational television stations be entitled to syndicated exclusivity protection. Because such stations were not covered by former syndicated exclusivity rules, and their inclusion was not discussed in the *Notice*, action on this proposal was deferred.

[20] As provided in Section 73.601, the scope of the television broadcast station rules includes commercial and noncommercial educational television broadcast stations, and where indicated, low power television and television translator stations. *See* 47 CFR §73.601.

[21] *See* 47 CFR §§74.701-74.784.

Separate Statement
of
Commissioner James H. Quello
Concurring in Part

In re: Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries (General Docket No. 87-24)

I concur with issuing a *Further Notice* in this proceeding because it proposes to expand syndicated exclusivity protection to noncommercial broadcasters. The geographic scope of our syndicated exclusivity rules is also worthy of discussion. Unfortunately, I am unable to support various parts of the *Further Notice of Proposed Rule Making*.

I am primarily concerned with the Commission's treatment of the non-network territorial exclusivity rule. It is interesting to note that the item is not as conclusive as the *Notice of Inquiry* or the *Report and Order* in this proceeding. While the change in tone is a step in the right direction, I must nevertheless disagree with the Commission's approach to reexamining the rule.

The existing non-network territorial exclusivity rules were adopted to correct market imperfections caused by the Commission's allocation plan. Stations in markets that are located adjacent to larger television markets may be excluded from obtaining program product. After careful consideration, the Commission adopted the 35 mile non-network territorial exclusivity rule to ensure that stations in fringe areas and overshadowed markets have access to programming.

There is nothing in the record to indicate that the problem of overshadowed markets has been resolved. On the contrary, several commenters state that expanding the 35-mile rule will have a disastrous effect on their ability to purchase quality programming. Indeed, WMUR-TV, which was one of the examples cited by the Commission when it first adopted the non-network territorial exclusivity rules, aptly illustrates the problems facing stations in fringe markets. The Motion Picture Association of America stated that the 35-mile rule actually enhanced program distribution. Weighed against this uncontroverted evidence is the unsubstantiated belief that the 35-mile non-network territorial exclusivity rule may somehow impair program production and distribution. Apart from an unflinching belief in marketplace theory, there is no support for this contention.

What is troubling about the Commission's decision, is that it places an evidentiary burden on the parties to disprove the majority's preconceived economic theories. The evidence already submitted in this record appears to satisfy most of the Commission's questions. Curiously, the Commission solicits data not only on the issue of whether stations in fringe areas will have access to programming, but also what effect the lack of access to top-ranked programming has on these stations. The answer to this line of questioning should be self evident. This is especially true, given our previous conclusions that loss of audience due to duplication is harmful. If duplication is harmful, then lack of access to programming is obiviously damaging to local broadcasters.

No one disputes that private contractual freedom is necessary for a properly functioning program market. However, the freedom to contract must be tempered by competing communications policy objectives. In this case, the Commission's policy allocating stations to specific local communities defines the local programming market. Consistent with this policy, it is incumbent upon the Commission to ensure that stations have access to program product. Reliance on antitrust enforcement simply will not ensure that fringe stations will have access to programming. Given the paucity of evidence in this proceeding demonstrating a need for a change in our existing rule, I see no need to question its public interest value at this time.

The *Further Notice* also solicits comment on the network territorial exclusivity rule. At first glance, it would seem that the problem of overshadowed markets would be equally applicable to this rule. However, because networks attempt to clear advertising in all markets, there is an incentive to make sure that stations in all markets have access to network programming. Thus, unlike the non-network programming market, there may be a natural self-policing function with respect to the distribution of network programming. Nevertheless, depending on the strength of the affiliate, it is possible that larger stations may attempt to limit additional network affiliation with stations located on the fringe of their market. Such a strategy would make sense where the affiliate would gain access to fringe markets through cable importation and without the limiting effect of the network nonduplication rule. Thus, I cannot agree with the tentative conclusion in the item that private parties are in a better position to determine the appropriate market boundaries.

Finally, the item reaches the tentative conclusion that the geographic limits, if any, should be the same for all of the program exclusivity rules. While this approach has the appeal of consistency, I cannot agree with the tentative conclusion. Each rule is based on a different communications policy.

For, example, the non-network territorial exclusivity rule is necessary to ensure television stations have access to programming in small markets. The syndicated exclusivity rule is designed to prevent duplication by cable systems and help rectify the imbalance created by the compulsory copyright. Thus, it is quite possible that the underlying purpose of each exclusivity rule requires a different geographic limit.

While I compliment the majority for taking a more neutral stance on this issue, I simply do not believe the case has been made for questioning the efficacy of the 35-mile non-network territorial exclusivity rule. Moreover, I am concerned that modifications to our network exclusivity rule will create similar "overshadowing" problems. Finally, I disagree that our program exclusivity rules must have the same geographic limits. I would ask commenters to address these issues.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-508

In the Matter of

Amendment of Section 73.202(b), RM-5593
Table of Allotments,
FM Broadcast Stations.
(Liberal, Kansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1988; Released: October 21, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd. 754 (1987), in response to a petition filed by Thunderbird Broadcasting, Inc. (petitioner). The *Notice* proposed the allotment of FM Channel 286C2 to Liberal, Kansas, as that community's fourth FM broadcast service. Petitioner filed comments in support of the *Notice* and stated its intention to apply for the channel. No other comments were received.

2. Channel 286C2 can be allocated to Liberal, Kansas, consistent with the minimum distance separation requirements of Section 73.207 of the Commission's Rules.[1]

3. In view of the fact that the proposed allocation could provide a fourth FM broadcast service to Liberal, we believe the public interest would be served by a grant of the petitioner's request.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 5, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Liberal, Kansas	268C1, 274C1, 286C2, 298C1

5. The window period for filing applications will open on **December 6, 1988,** and close on **January 5, 1989.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for the allotment of Channel 286C2 at Liberal, Kansas are 37-02-30 and 100-55-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-546

In the Matter of

Amendment of Section 73.202(b),	RM-6068
Table of Allotments,	RM-6258
FM Broadcast Stations.	
(Marble Falls and Johnson City, Texas)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 29, 1988; Released: October 21, 1988

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 7568 (1987), proposing the allotment of Channel 300A to Marble Falls, Texas, as that community's first local FM service, at the request of Don Werlinger, d/b/a The Broadcast Development Group, Inc. (petitioner). In response to the *Notice*, Hawkins Broadcasting, Inc. (Hawkins), licensee of Stations KHLB(AM/FM), at Burnet, Texas, filed a counterproposal seeking the allotment of Channel 300C2 to Johnson City, Texas, in lieu of the petitioner's proposal.[2] Petitioner filed comments restating his intention to apply for the Marble Falls allotment, but subsequently withdrew his interest. Hawkins filed comments.

2. In view of the petitioner's withdrawal of interest no further consideration will be given to the Marble Falls proposal. As stated in the *Notice*, the Commission generally refrains from making an allotment absent an expression of interest in the channel. Therefore, we shall only entertain the Johnson City proposal.

3. Channel 300C2 can be allotted to Johnson City, Texas, in compliance with the Commission's minimum distance separation requirements with a site restriction. A site restriction of 18.9 kilometers (11.7 miles) west of the city is required in order to avoid short spacings to Station KZEU(FM), Channel 300C1 at Victoria, Texas, and vacant and applied for Channel 299A at Georgetown, Texas. [3] In addition, the restriction will provide protection to Channel 300B at Piedras Negras, Mexico.

4. Mexican concurrence has been obtained, since Johnson City is located within 320 kilometers (199 miles) of the U.S.-Mexican border.

5. We believe the public interest can be served by the allotment of Channel 300C2 to Johnson City, Texas, as that community's first local FM service. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 5, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Johnson City, Texas	300C2

6. The window period for filing applications will open on **December 6, 1988,** and close on **January 5, 1989.**

7. IT IS FURTHER ORDERED, That the petition filed by Don Werlinger, d/b/a The Broadcast Development Group, Inc., proposing the allotment of Channel 300A to Marble Falls, Texas (RM-6068), IS HEREBY DISMISSED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communityof Johnson City, Texas, has been added to the caption.

[2] Public Notice of the counterproposal was given February 5, 1988, Report No. 1711.

[3] The restricted site coordinates are 30-13-30 and 98-35-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-534

In the Matter of

Amendment of Section 73.202(b), RM-6067
Table of Allotments,
FM Broadcast Stations.
(Lubbock, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1988; Released: October 21, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Barton Broadcasting Company (petitioner), permittee of Station KEJS(FM), Channel 292A at Lubbock, Texas, the Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 7580 (1987), proposing substitution of Channel 293C2 for Channel 292A at Lubbock, and modification of the station's construction permit accordingly. Petitioner filed supporting comments reiterating its intention to apply for the channel.[1]

2. We believe the public interest would be served by allotting Channel 293C2 to Lubbock, Texas, as a substitute for Channel 292A, providing that community with an additional expanded radio service. The channel can be allotted to Lubbock in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.4 kilometers (7.7 miles) east of the city.[2] The restriction is necessary in order to avoid a short spacing to a construction permit for Channel 293C at Roswell, New Mexico (BPH-850712OX).

3. As requested, we are herein modifying the permit of Station KEJS(FM) to specify operation on Channel 293C2 in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 5, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Lubbock, Texas	229C1, 233C1, 242C1 258C1, 266C1, 273C1 293C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit of Station KEJS(FM), Lubbock, Texas, IS MODIFIED, to specify operation on Channel 293C2 in lieu of Channel 292A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner also filed additional comments in lieu of reply comments.

[2] The restricted site coordinates are 33-35-34 and 101-42-36. It should be noted that this site restriction is greater than the 3.6 kilometer restriction initially required in the *Notice*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-617

In the Matter of

Amendment of Section 73.202(b), RM-6087
Table of Allotments,
FM Broadcast Stations.
(Lufkin, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1988; Released: October 21, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Darrell E. Yates (petitioner), licensee of Station KUEZ(FM), Channel 257A at Lufkin, Texas, the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 382 (1988), proposing the substitution of Channel 257C2 for Channel 257A at Lufkin and modification of the station's license accordingly. Petitioner filed supporting comments reiterating his intention to construct the high powered facility.

2. We believe the public interest would be served by the substitution of Channel 257C2 for Channel 257A at Lufkin, Texas, as the community could receive its second wide coverage area FM service. Channel 257C2 can be allotted to Lufkin in accordance with the Commission's minimum distance separation requirements with a site restriction of 7.5 kilometers (4.6 miles) northwest of the community.[1] The restriction is necessary in order to avoid a short spacing to an application (BPH870212IC) for Station KHLA(FM), Lake Charles, Louisiana. The relocation of Station KUEZ(FM)'s current transmitter site is also required.

3. As requested, we are modifying the license of Station KUEZ(FM) to specify operation on Channel 257C2 in lieu of Channel 257A in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 5, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Lufkin, Texas	257C2, 286C

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KUEZ(FM), Lufkin, Texas, IS MODIFIED, to specify operation on Channel 257C2 in lieu of Channel 257A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] We note that the 7.5 kilometer restriction is less than the originally proposed restriction (12.9 km) specified in the *Notice*. The restricted site coordinates are 31-23-54 and 94-46-31.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-152

In the Matter of

Amendment of Section 73.202(b), RM-6291
Table of Allotments,
FM Broadcast Stations.
(Denison, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1988; Released: October 21, 1988

By the Deputy Chief, Policy and Rules Division:

1. At the request of Sunbelt Wireless Company (petitioner), licensee of Station KMKT-FM, Channel 285A at Denison, Texas, the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 2206 (1988), proposing the substitution of Channel 285C2 for Channel 285A at Denison and modification of the station's license accordingly. Petitioner filed supporting comments reiterating its intention to effectuate the high powered facility.

2. We believe the public interest would be served by the substitution of Channel 285C2 for Channel 285A at Denison, Texas, providing that community with its first wide coverage area FM service. Channel 285C2 can be allotted to Denison in accordance with the Commission's minimum distance separation requirements with a site restriction of 21.0 kilometers (13.0 miles) east of the community.[1] The restriction is necessary in order to avoid short spacings to Station KWNS(FM), Channel 285A, Winnsboro, Texas, and Station KZBX(FM), Channel 285A, McAlester, Oklahoma.

3. As requested, we are modifying the license of Station KMKT-FM to specify operation on Channel 285C2 in lieu of Channel 285A in accordance with Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 5, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Denison, Texas	285C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KMKT-FM, Denison, Texas, IS MODIFIED, to specify operation on Channel 285C2 in lieu of Channel 285A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Steve Kaminer
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The restricted site coordinates are 33-45-22 and 96-46-22.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

SATELLITE BROADCASTING COMPANY, INC. File No. 709674

PARALLEL COMMUNICATIONS, INC. File No. 800225

Application for a License
in the Private Operational Fixed
Microwave Service

ORDER

Adopted: September 30, 1988; Released: October 21, 1988

By the Chief, Private Radio Bureau:

I. INTRODUCTION

1. Parallel Communications Corporation (Parallel), by petition of December 17, 1987, seeks reinstatement of its license for a station in the private operational fixed microwave service (OFS) in Los Angeles, California. Alternatively, Parallel asks for a waiver of the Commission's minimum mileage separation requirements to permit the grant of both its requested station and the station applied for by Satellite Broadcasting Company (Satellite). Satellite opposes both aspects of the request.

2. In late 1983, both Parallel and Satellite filed applications for new OFS authorizations in the 2.5 GHz band. Given the existence of mutually exclusive applications for that area, the Commission conducted a lottery pursuant to Section 1.972 of the Commission's Rules, 47 C.F.R. § 1.972.[1] While Satellite's application ranked higher than Parallel's in the initial lottery rankings,[2] this Bureau subsequently dismissed the Satellite application by letter of May 28, 1986, as having been untimely filed. Satellite had delivered the application to the Commission's Office of the Secretary in Washington, D.C., from where it had then been forwarded to the Private Radio Bureau's Gettysburg, Pennsylvania office, arriving there after the relevant closing date. The Bureau, relying on the Gettysburg receipt date as the actual filing date, dismissed Satellite's application and granted Parallel's. On June 23, 1986, Satellite filed an Application for Review of that grant to Parallel.

3. At the same time that it was pursuing Commission review of the Los Angeles grant, Satellite sought judicial review of a Commission action dismissing on similar grounds of untimeliness two OFS applications that Satellite had filed for other cities. [3] In *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1 (D.C. Cir. 1987), (*Satellite Broadcasting Co.*), the Court reversed the Commission's action, finding the Commission rules as to place of filing so ambiguous as to make dismissal for failure to file in Gettysburg as opposed to Washington arbitrary and capricious, and remanded the applications for reinstatement. Accordingly, the Bureau reevaluated all Satellite applications that had been dismissed as untimely filed because of this filing location discrepancy. As a result, the Bureau ultimately reinstated Satellite's Los Angeles application. By letter of November 19, 1987, the Bureau set aside the Parallel grant.[4]

II. THE PLEADINGS

4. In seeking reinstatement of its license, Parallel argues first that *Satellite Broadcasting Co.* is not applicable to the filing of Satellite's Los Angeles application, as Satellite here displayed bad faith and lack of diligence. Parallel cites in support of this position numerous requests for clarification filed by Satellite in connection with OFS rule making proceedings, Satellite's decision to file its Los Angeles application on the last day of the filing period and Satellite's claimed reliance in choosing to submit its application in Washington upon advice given a legal assistant by an unnamed Commission staff member. Due diligence required more careful research, Parallel contends.[5]

5. Absent reinstatement of its license, Parallel seeks waiver of the mileage separation rule, arguing that Los Angeles' mountainous terrain and wide area justify a special standard here. Parallel claims, finally, that equitable considerations favor retention of its license, in that the "legal machinations" associated with Satellite's appeal cost it significant legal and other expenses.[6]

6. Satellite, in opposition, maintains that *Satellite Broadcasting Co.* is dispositive of the issues here, that Parallel has failed to make the necessary waiver showing and that Parallel was aware at all times of Satellite's challenges to the dismissal of its applications, leaving Parallel no legitimate claim for equitable relief.[7]

III. DISCUSSION

7. We turn first to Parallel's attempt to distinguish Satellite's Los Angeles filing from the filings considered in *Satellite Broadcasting Co.* We find that Parallel's arguments do not address the rationale of that decision, which controls the disposition of this petition. In reversing the Commission's action, the Court focused not on the motivation of the applicant but upon the ambiguity of the rules themselves. It concluded that the Commission's Rules could reasonably be interpreted as imposing two different and conflicting requirements as to where these applications could be filed and, therefore, did not provide adequate notice of the filing requirements. *See* 824 F.2d at 3-4.

8. The facts regarding Satellite's Los Angeles application in this proceeding are the same as those considered by the Court in *Satellite Broadcasting Co.* This Bureau dismissed Satellite's OFS application for Los Angeles as untimely filed because it arrived in Gettysburg late, even though it was timely filed at the Commission's offices in Washington, D.C. The Court has already found the rules which led Satellite to file its other similar OFS applications in Washington, rather than Gettysburg, ambiguous because those rules failed to give full notice of the Commission's filing requirements. Therefore, just as in *Satellite Broadcasting Co.*, the applicant here cannot be penalized for a reasonable interpretation of the Rules. Accordingly, Satellite's application for Los Angeles must be reinstated.

9. Parallel's waiver request must also be rejected. To justify waiver of the 50 mile separation requirement for 2.5 GHz OFS licensees, applicants must submit a detailed engineering analysis showing unique terrain conditions or peculiar propagation characteristics. Applicants must establish that they will not cause interference to co-channel licensees whose grants are based on a separation of 50 miles between transmitters. In the alternative, they must obtain statements of willingness to accept interference from these licensees. Further, applicants seeking waiver of the separation requirement must themselves agree to accept interference from licensees whose grants are based on a separation of 50 miles between transmitters.[8] *Selection Process for 2. 5 GHz OFS Licenses*, FCC 85-12, released January 15, 1985. Parallel's vague references to Los Angeles' mountainous terrain and wide area hardly constitute a detailed showing in this context. Nor has the applicant offered the required statements as to interference caused and received. A waiver is not justified under these circumstances.

10. Turning finally to Parallel's request for relief on equitable grounds, Parallel claims to have incurred significant legal and other expenses because of the "legal machinations" associated with Satellite's pursuit of judicial review. We find this argument unpersuasive. Parallel was well aware of Satellite's appeal. In fact, Parallel sought and was granted an extension of time to construct based upon the pendency of that appeal. If Parallel chose to incur expenses while awaiting the outcome of Satellite's litigation, it did so voluntarily with full knowledge of the risks involved. Equitable relief is neither justified nor appropriate under these circumstances.

IV. CONCLUSION

11. For the reasons set forth above, we affirm our decision to set aside Parallel Communications, Inc.'s license for a station in the private operational fixed microwave service in Los Angeles, California. Accordingly, pursuant to Sections 0.331 and 1.106 of the Commission's Rules,[9] the Petition for Reinstatement and/or Waiver filed by Parallel Communications, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] Lottery Notice, Mimeo No. 5742, released July 12, 1985.

[2] Public Notice, Mimeo No. 6580, released August 22, 1985.

[3] These other cities were Chicago, Illinois and Sacramento, California.

[4] Satellite's June 23, 1986, Application for Review was mooted by these events and is hereby dismissed.

[5] Opposition to Application of Satellite Broadcasting Company, Inc. for Review and Rescission of License, pp 6-9, incorporated by reference into Petition for Reinstatement and/or Waiver.

[6] Petition for Reinstatement and/or Waiver, pp. 3-4.

[7] Opposition to Petition, pp. 5-10.

[8] *See* Section 94.15(b)(2) of the Commission's Rules, 47 C.F.R. § 94.15(b)(2).

[9] 47 C.F.R. §§ 0.331, 1.106.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

RADIO RELAY MICHIGAN CORP. File No. 24064-CD-P/L-06-86

For authority to operate on frequency 454.075 Mhz in the Public Land Mobile Service at Battle Creek, Kalamazoo, Ann Arbor, Jackson, Grand Rapids, and Dearborn, Michigan

MEMORANDUM OPINION AND ORDER

Adopted: October 13, 1988; Released: October 21, 1988

By the Chief, Common Carrier Bureau:

1. Radio Relay Michigan Corp. (Radio Relay) filed a single application to construct new two-way public land mobile service facilities at six Michigan locations. Four of those locations were electrically mutually exclusive with facilities proposed by Murl N. Roach (File No. 22939-CD-P/L-01-86). In *Radio Relay Michigan Corp.*, 2 FCC Rcd 3335 (1987) (*MSD Order*), the Chief of the Mobile Services Division of the Common Carrier Bureau issued an order dismissing Radio Relay's application on the grounds that the application combined mutually exclusive and non-mutually exclusive proposals within the same application in violation of Section 22.31(e) of the Commission's Rules.[1] The *MSD Order* concluded that the intent of Section 22.31(e) is to prohibit the combining of mutually exclusive and non-mutually exclusive service proposals in the same application. The *MSD Order* explained that the foregoing is true even when, as is the situation here, the same frequency is requested at each of several different geographic locations. The referenced order also granted the petition to deny filed against Radio Relay's application by RAM Communications of Michigan, Inc. (RAM). Radio Relay has filed a petition for reconsideration of the *MSD Order*. RAM has filed an opposition and Radio Relay has filed a reply.

2. In its petition for reconsideration, Radio Relay repeats its previous argument that Section 22.31(e) prohibits the combination in a single application of mutually exclusive and non-mutually exclusive facilities on different frequencies, but does not prohibit this combination of facilities on the same frequency. Radio Relay claims that the *MSD Order* changed, rather than interpreted, the substance of the rule without giving notice of the proposed rule change and affording interested parties an opportunity to comment on the proposal in a Rule Making proceeding pursuant to 5 U.S.C. Section 553. In addition, Radio Relay argues that if the Commission should affirm the *MSD Order*'s interpretation of Section 22.31(e), that rule should be waived in this case because strict application of the rule would be unduly harsh and contrary to the public interest. Radio Relay notes that it and Mr. Roach have entered into an agreement to resolve the mutual exclusivity between their proposals and that grant of their applications would increase service to the public and avoid any further delay in the initiation of service to the Michigan public.

3. We affirm the *MSD Order*'s interpretation of Section 22.31(e) of the Commission's Rules. In this regard, we observe that Section 22.31 of the Rules is entitled "Mutually exclusive applications" and explains the general situations in which applications will be considered mutually exclusive. The Commission added Section 22.31(e) to its Rules in an effort to expedite the processing of public mobile radio applications. *See, Public Mobile Radio Services*, 95 F.C.C.2d 769, 798 (1983), *reconsideration denied in relevant part*, 101 F.C.C.2d 799, 806 (1985). Combining mutually exclusive and non-mutually exclusive service proposals in a single application delays action on proposals for "clear" spectrum (*i.e.*, frequency proposals that are not mutually exclusive with a previously filed proposal). The delay will occur both where multiple frequencies at one location are combined and where multiple locations with the same frequency are combined. Thus, as the *MSD Order* stated, the clear intent of Section 22.31(e) is to prohibit the combining of mutually exclusive and non-mutually exclusive service proposals in the same application, even if only one frequency is to be used at all relevant locations, as is the case here.

4. Significantly, in the Rule Making proceeding in which the current version of Section 22.31(e) of the Rules was adopted, the Commission explained that if an applicant requests a frequency that is mutually exclusive with another application that had *not* previously appeared on public notice, it will assume that the second application violates the rule by chance and "will allow the applicant to sever its mutually exclusive portion and to receive *nunc pro tunc* treatment for its additional frequencies *or locations*." *Public Mobile Radio Services*, 95 F.C.C.2d 769, 798 (1983). (Emphasis added.) The foregoing language indicates that the Commission intended both situations, *i.e.*, multiple sites and multiple frequencies, to fall within the ambit of the rule, as long as the sites or frequencies involved at least one proposal which was mutually exclusive with a previously filed application and at least one proposal which was "clear," *i.e.*, not mutually exclusive with a previously filed proposal. Any other interpretation of the rule would negate the Commission's express goal in enacting the rule, namely, to expedite the processing of public mobile radio applications. Contrary to Radio Relay's claim, the *MSD Order* did not change the substance of the rule; it merely interpreted it. An agency need not institute a Rule Making proceeding each time it interprets and applies its own rules. *See, e.g., Arrow Air, Inc.* v. *Dole*, 784 F.2d 1118 (D.C.Cir. 1986). In the case before us, the language quoted above from *Public Mobile Radio Services* underscores the point that the Commission intended to prohibit the combining of mutually exclusive and non-mutually exclusive service proposals in the same application, even if only one frequency is involved, as is the case here.

5. Moreover, as explained in the *MSD Order*, when Radio Relay filed its application on June 5, 1986, it had constructive notice that several of the facilities for which it was applying were mutually exclusive with those proposed in Mr. Roach's application, which had been listed on a Public Notice, Report No. PMS-86-30, released April 23, 1986. In *Public Mobile Radio Services*, *supra*, the Commission stated that "if the first application has been placed

on public notice, the second applicant is charged with actual knowledge and must request additional frequencies in separate applications. Any nonconforming application will be dismissed in its entirety." 95 F.C.C.2d at 798. Thus, since Radio Relay had notice of an application which was mutually exclusive with four of Radio Relay's proposed locations when it filed its application, the processing staff properly dismissed Radio Relay's application pursuant to the Commission's directive in *Public Mobile Radio Services*.

6. Lastly, we decline to grant Radio Relay's request for a waiver of the rule. Radio Relay has failed to state sufficient reasons to justify granting its waiver request pursuant to Section 22.19 of the Commission's Rules. The foregoing rule section explains that waivers will not be granted unless an applicant makes an affirmative showing that the underlying purpose of the rule to be waived will not be served by applying it in a particular case or that the unique facts and circumstances of a particular case render application of a particular rule inequitable, unduly burdensome or otherwise contrary to the public interest. Radio Relay merely claims that we should process its application in order to expedite service. This claim could be made by any disappointed applicant who is not in compliance with Section 22.31(e) and thus does not represent unique facts or circumstances. Our experience indicates that combining mutually exclusive and non-mutually exclusive proposals in one application actually delays service to the public because it delays the processing of public mobile radio applications. Furthermore, the fact that Radio Relay and Mr. Roach have entered an agreement that would eliminate their mutual exclusivity does not cause us to alter our decision. In this regard, the issue is not whether the mutually exclusive facilities requested by Radio Relay could ultimately be granted, but whether they should have been combined with its proposal for non-mutually exclusive facilities. As to Radio Relay's complaint that the dismissal sanction is too harsh, the Commission considered fully the severity of the dismissal remedy in the referenced Rule Making and decided that the remedy was appropriate. *Id.* Thus, Radio Relay has not demonstrated why the rule should not be applied to it.

7. Accordingly, IT IS ORDERED, that the petition for reconsideration filed by Radio Relay Michigan Corp. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock, Chief
Common Carrier Bureau

FOOTNOTE

[1] Section 22.31(e) provides that:

> An applicant requesting a frequency which is mutually exclusive with another application that has previously been placed on public notice shall not in the same application request additional frequencies which are not mutually exclusive with the first application. Instead, additional frequencies may be applied for in a separate application.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of

Petitions for Reconsideration
of Grants of Licenses of

ARCH CAPITOL DISTRICT, INC. 7320-04/L-2494
99 Bedford Street
Boston, Massachusetts 02111

Licensee of Station WNKJ 994
in the Business Radio Service

HUDSON VALLEY MOBILE TELEPHONE, INC. 7320-09/L-2495
4422 Main Street
Poughkeepsie, New York 12601

Licensee of Station WNKC 815
in the Business Radio Service

and

Application for Consent to
Transfer Control of

HUDSON VALLEY MOBILE TELEPHONE, INC. 7320-02/L-2508
4422 Main Street
Poughkeepsie, New York 12601

Licensee of Station WNKC 815
in the Business Radio Service

MEMORANDUM OPINION AND ORDER

Adopted: September 30, 1988; Issued: October 21, 1988

By the Chief, Private Radio Bureau:

1. The Private Radio Bureau has for consideration Petitions for Reconsideration filed on behalf of Message Center Beepers, Inc. (MCB) seeking to set aside the December 9, 1987, grant of Business Radio Service station license WNKJ 944 to Arch Capitol District, Inc. and the October 21, 1987, grant of Business Radio Service station license WNKC 815 to Hudson Valley Mobile Telephone, Inc.[1] Also under consideration is MCB's Petition to Deny the transfer of control of WNKC 815 from Hudson to Arch.[2,3] MCB alleges that the subject licenses were erroneously coordinated on the frequency 152.480 MHz and that Arch and Hudson sought this frequency for the purpose of interfering with MCB's private carrier paging operations. For the reasons set forth below, the petitions are denied.

BACKGROUND

2. Frequencies such as 152.480 MHz are assigned to private land mobile stations on a shared basis and are not assigned for the exclusive use of any licensee. 47 C.F.R. § 90.173(a). Because these are shared frequencies, applicants and licensees are required to cooperate in their selection and use in order to minimize interference. 47 C.F.R. § 90.173(b). To this end, applicants are required to submit "frequency coordination" to support their requests for authorization to operate on a particular frequency at their proposed locations. 47 C.F.R. § 90.175. Frequency coordination is the process by which a private organization that is recognized by the Commission, in this case the National Association of Business and Educational Radio, Inc. (NABER), recommends an appropriate frequency for applicants in a designated radio service.

3. There are four paging-only frequencies, each with a different maximum power limitation, in the 150 MHz band for use by Business Radio Service eligibles.[4] 47 C.F.R § 90.75(b). In the 460 MHz band, there are nine paging-only frequencies, eight of which permit 350 watts output. *Id.* There are also frequencies allocated for private carrier paging in the 929/930 MHz band. *Id.*

4. According to NABER, 152.480 MHz is the most desirable frequency for private carrier paging companies because of its high permissible output power and propagation characteristics which result in better coverage and building penetration than 350 watt output frequencies in higher bands. In addition, the cost for 460 MHz and 900 MHz band paging equipment is greater than for 152.480 MHz equipment, providing another incentive for applicants to request the latter frequency. Consequently, the majority of private carrier paging applications received by NABER seek coordination for 350 watts output power on 152.480 MHz.[5]

5. In recognition of the congestion on 152.480 MHz in many areas, NABER states that it suggests that applicants accept frequency recommendations on 460 MHz band or 929/930 MHz band frequencies. Applicants often respond, however, that equipment costs for the higher bands are too high, or that their propagation requirements necessitate 152.480 MHz. In such instances, NABER recommends that applicants use automatic monitoring equipment to minimize the potential for interference.[6]

6. At issue in this case are grants to Hudson and Arch to operate private carrier paging systems on 152.480 MHz in the Poughkeepsie and Albany areas, respectively.[7] These licenses were granted on the basis of frequency coordination recommendations by NABER.[8] MCB holds a dominant market position as a provider of private carrier paging service in these areas by virtue of its numerous authorizations for private paging systems on 152.480 MHz.[9]

THE PLEADINGS

7. In its petitions, MCB asserts that the frequency coordination recommendations provided for Arch and Hudson by NABER were made in error in view of the "dozens of base stations within a 75-mile radius" of Arch's station and the "80 co-channel base stations within a 75-mile radius" of Hudson's station. MCB argues that there are more appropriate, less congested frequencies that NABER should have coordinated. For example, MCB maintains

that 462.925 MHz is not assigned in the area and, therefore, is a more suitable frequency for NABER to have coordinated.

8. MCB also contends that there was no business reason for Arch and Hudson to request 152.480 MHz. It concludes, therefore, that the applications were filed as "strike" applications in an effort to block further expansion of MCB's systems.[10] To support its contentions that the motives of Arch and Hudson are "malevolent," MCB has submitted an unsworn statement from Charles H. Saile, a former employee of Arch, who states that he was told by Christopher Jenkins, another former employee of Arch, that Arch's plan was to interfere with MCB's use of 152.480 MHz.[11] Saile also states that John Saynor, President of Arch, told him that the only purpose for Arch's application was to block MCB's calls and that there were no plans to order pagers or sell them to customers. *Id.*

9. In addition, MCB has submitted affidavits from two of its employees and George Seabury, an employee of Saint Peter's Hospital.[12] The hospital is a customer on MCB's paging system. The affidavits state that two employees of Mobilfone, a subsidiary of Arch, told Seabury that Arch intended to use 152.480 MHz to provide inexpensive paging service for eight dollars per month to customers who would transmit frequent messages to large numbers of pagers. These Mobilfone employees reportedly urged Seabury to seek paging service for the hospital from a Mobilfone radio common carrier system in order to avoid the congestion that would occur on MCB's 152.480 MHz system as a result of Arch's shared use of the 152.480 MHz channel.[13]

10. In their oppositions to the MCB petitions, Arch and Hudson argue that NABER'S coordination for 152.480 MHz was appropriate. They emphasize that the coordination recommendation was contingent on their use of automatic monitoring and "lock-out" devices to minimize the potential for interference. Moreover, they contend that 152.480 MHz is uniquely suited for their purposes because of the 350 watt maximum output power and because of the superior propagation and building penetration qualities characteristic of a 150 MHz band frequency. Arch and Hudson also state that they have an inventory of paging units and transmitting equipment that can be converted to 152.480 MHz at minimum cost.

11. Arch and Hudson both deny that they intend to interfere with MCB. In this regard, John Saynor, Arch's President, in an affidavit, denies the allegations in Saile's statement. Saynor further avers that both Saile and Jenkins "were asked to leave Arch Capitol under unfavorable circumstances."[14]

12. Regarding Mobilfone's offer to provide paging service to Saint Peter's Hospital, Arch has submitted an affidavit by William B. Sterndale, its Vice President and General Manager, acknowledging that the purpose of his meeting with Seabury was to offer the hospital alternatives to the private carrier paging services furnished by MCB.[15] Sterndale states that the hospital had been a customer of Arch until August 1987 when it contracted for service with MCB. Accompanying the affidavit is a copy of the proposal submitted to the hospital by Arch offering service which ensures priority over other accounts on Arch's radio common carrier system.

DISCUSSION

13. We are unpersuaded by MCB's assertion that NABER's coordination recommendation was erroneous. The frequency 152.480 MHz is to be shared among licensees and is not for the exclusive use of any individual operator regardless of the site of the operation or its date of commencement of operation. In accomplishing the Commission's goal of maximizing spectrum utilization through shared use, the coordinator should consider how many licensees as well as how many systems are sharing a frequency in a given area. In the instant case, for example, MCB is licensed to operate on 152.480 MHz at 72 locations which are within a 75 mile radius of Arch's stations and at 38 locations which are within a 75 mile radius of Hudson's station.[16] However, this degree of transmitter penetration does not in and of itself provide a basis for claiming that a coordination recommendation for an additional shared user is improper.

14. In discussing the role of the frequency coordinators in its Private Land Mobile frequency coordination proceeding, the Commission stated that it is proper for coordinators to considers factors other than spectrum efficiency in honoring requests for a specific band if a frequency is superior from the standpoint of the needs of the applicant. *Report and Order* in PR Docket No. 83-737, 103 FCC 2d 1093, 1108 (1986). In such cases, the Commission stated, "while the frequency requested may not always be the one that will result in the least amount of interference, it may be most appropriate under the circumstances." *Id.* at 1109. In accordance with this policy, the high permissible power and propagation characteristics of 152.480 MHz provide an adequate basis for NABER's coordination recommendations for Arch and Hudson.

15. Moreover, MCB's assertion that 152.480 MHz is too congested to permit Arch and Hudson to share the frequency with existing stations is inconsistent with MCB's own recent conduct before the Commission. Information provided by NABER indicates that since Hudson and Arch requested NABER'S coordination, MCB has requested coordination on 152.480 MHz for more than 15 paging systems involving more than 50 different locations within approximately 75 miles of the Arch and Hudson systems.[17] Furthermore, in its March 21, 1988, *Comments* in response to NABER's Petition for Rule Making (RM-6276) concerning the use of the 150 MHz band, MCB contended that there is no need for additional high powered 150 MHz paging frequencies as an alternative to 152.480 MHz. On the contrary, MCB opposed the allocation of additional 150 MHz band frequencies for high powered paging stations claiming that "NABER's request for more commercial paging frequencies is premature" and that the need for such expansion has not been "fully demonstrated". Comments at 5-6. To the extent that actual operations cause interference or result in any other operational problems, we view such matters as compliance matters and will treat them accordingly.

16. We are similarly unpersuaded by MCB's contention that there is a reasonable basis for suspecting the motives of the Arch and Hudson filings or that these filings were "strike" applications. As noted above, the desirability of 152.480 MHz for their paging services fully supports their applications to operate on this frequency. The Commission assumes that an applicant possesses the basic character qualifications to be a licensee and must rely on the good faith and truthfulness of representations made during the applications process. *See Sea Island Broadcasting*, 60 FCC

2d 146, (1976); *Nick J. Chaconas*, 35 FCC 2d 698, 702 (1972). Thus, we begin with the assumption that the applications were filed for legitimate purposes.

17. Unsupported statements by a discharged employee of an applicant do not raise genuine issues of fact requiring a hearing to determine whether the applicant's intention in filing an application was to interfere rather than to compete with existing private carrier paging systems.[18] Moreover, in this case, the information provided in Saile's statement is contradicted by the other affidavits submitted by MCB that demonstrate that Arch intends to compete aggressively by offering inexpensive paging service. In addition, the fact that Arch and Hudson have agreed to the use of automatic monitoring and "lock-out" devices provides further assurances that interference was not the purpose for their applications.[19] We also note that once Arch and Hudson begin operations, MCB will have a similar obligation not to cause interference to them (or any other co-channel user).

18. Finally, there is no merit to MCB's claim that these were "strike" applications. An essential element of a "strike" application is that the timing of the application is intended to obstruct or delay the application of another. *Grenco, Inc., supra*, note 10. In the instant case, there is no showing that the Arch and Hudson applications obstructed or delayed any MCB application.

CONCLUSION

19. In view of the above, we conclude that the applications of Arch and Hudson were properly coordinated and granted. We also conclude that MCB's complaint provides no basis for delaying the grant of the application for consent to transfer control of the license for station WNKC 815 from Hudson to Arch.[20]

20. IT IS THEREFORE ORDERED that the petitions for reconsideration filed by Message Center Beepers, Inc., ARE DENIED.

21. IT IS FURTHER ORDERED that the petition for review filed by Message Center Beepers, Inc., of the Bureau's March 31, 1988, conditional grant of the transfer of control of station WNKC-815 IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] MCB's initial December 9, 1987, pleading concerning Arch was styled a Petition to Deny. MCB requested, however, that if the license had already been granted, its petition be considered a Petition for Reconsideration. As the license was granted the same day that the petition was filed, we are treating the petition as one for reconsideration. MCB's initial November 20, 1987, pleading concerning Hudson was styled a Motion to Set Aside. We are treating it also as a petition for reconsideration. Also before the Bureau are MCB's supplements to its petitions, Arch's and Hudson's Oppositions to MCB's petitions and supplements and MCB's Replies. In addition to requesting reconsideration of the grant of WNKJ 994, MCB later filed a Motion to Set Aside the grant. We are considering this as part of the petition for reconsideration.

[2] Petitions to Deny are not permitted in the Private Land Mobile Radio Services as license applications for these services are granted on a shared rather than mutually exclusive basis. *See* 47 C.F.R. § 1.962. Therefore, we are treating MCB's petition as an informal complaint.

[3] The transfer of control was conditionally granted by the Bureau on March 31, 1988, subject to the outcome of this proceeding. The conditional grant characterized the transfer of WNKC 815 as an assignment of authorization although it was a transfer of control. MCB filed a Petition for Review of that action on April 1, 1988. In view of our decision, the petition is moot.

[4] The frequencies and power limitations are as follows: 152.480 MHz, 350 watts output; 154.625 MHz, 20 watts output; 157.740 MHz, 75 watts output; 158.460 MHz, 20 watts output.

[5] Letter from Emmett B. Kitchen, Jr., President of NABER, to Ralph A. Haller, Chief of the Private Radio Bureau (February 1, 1988).

[6] *Id.*

[7] Hudson is authorized to operate one base station at Poughkeepsie under call sign WNKC 815. Arch is authorized to operate base stations in Pattersonville, Albany, New Salem and Lake George, New York, under call sign WNKJ 944.

[8] NABER's coordination recommendations were contingent on Arch and Hudson agreeing to use an automatic channel monitoring and "lock-out" device to minimize interference to existing co-channel licensees.

[9] MCB is authorized to operate private carrier paging systems on 152.480 MHz at 72 locations within a 75 mile radius of Arch's Albany system and at 38 locations within a 75 mile radius of Hudson's Poughkeepsie system. In its pleadings, MCB has chosen a 75 mile radius as a representative area of operation. *See, i.e.*, MCB Motion to Set Aside, at p.2, November 20, 1987.

[10] A "strike" application is one which is filed, in whole or in part, to frustrate, delay or block a competing application. Grenco, Inc., 39 FCC 2d 732, 734 (1973).

[11] MCB Reply, Exhibit I, January 4, 1988. The statement was neither sworn to before a notary nor sworn to under penalty of perjury as required by Section 1.16 of the Commission's Rules, 47 C.F.R. § 1.16.

[12] MCB Supplement to Petition to Deny, Exhibits I, II and III, March 31, 1988.

[13] Mobilfone, a subsidiary of Arch, is a licensee of common carrier paging systems.

[14] Arch's Further Opposition, affidavit of John B. Saynor, January 22, 1988.

[15] Arch Opposition to Supplement to Deny, Attachment B, April 7, 1988.

[16] *See* fn. 9, *supra*.

[17] This information was provided to the Bureau by NABER on April 14, 1988. The information consists of co-channel user listings for NABER's coordination recommendations for the frequency 152.480. Commission records reflect that the majority of these applications have been granted.

[18] *See* United States v. FCC (SBS), 652 F.2d 72, 89-90 (D.C. Cir. 1980) (en banc). The Court of Appeals has noted that the Commission should always be mindful that an evidentiary hearing, despite its obvious benefits in many circumstances, can also be "a potent instrument for delay . . . exploited [by competitors of applicants] for unworthy purposes." United States v. FCC (SBS), at 91. In this regard, mere allegations by applicants' competitors

that applicants intend to intentionally interfere, without objective evidence of such interference, is an unjustified impediment to the applications process.

[19] As an additional assurance, Arch stated in a March 30, 1988, letter that it would provide the Commission with confidential reports, at six month intervals, identifying all customers using its private carrier paging system.

[20] *See* fn. 3, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

AMERICAN COMMUNICATION SERVICES, INC.	File Nos. 733630 733631 733632 733635 733638 733640

For consent to assign all constructed and unconstructed Operational Fixed Microwave (OFS) authorizations from Travenol Laboratories, Inc. to American Communications Services, Inc.

WAIVER

Adopted: October 11, 1988; Released: October 21, 1988

By the Chief, Land Mobile and Microwave Division:

1. American Communication Services, Inc. (American) is requesting consent to the assignment of all Private Operational Fixed Microwave (OFS) Service stations currently authorized to Travenol Laboratories, Inc. (Travenol). Eleven of these stations are not constructed. Section 94.47(b) of the Commission's Rules, 47 C.F.R. § 94.47(b), states that a license to operate a station may not be assigned or transferred prior to the completion of construction of the facility. Accordingly, American has requested a waiver of this rule.

2. American is a newly formed corporation created as part of reorganization and restructuring of Travenol Laboratories. Travenol and American contend that the proposed sale of Travenol's video teleconferencing business to American is not the type of transaction intended to be prohibited by Section 94.47(b). This section, according to petitioners, was promulgated as a part of the proceeding in which the Commission authorized licensees in the OFS to become private carriers and was aimed at prohibiting entities from applying for spectrum solely for the purpose of selling to other parties the right to establish the station. Travenol and American state that the stations involved were applied for long before the Commission authorized private carrier systems and were intended solely to satisfy internal demands for communications services. Travenol contends that its decision to spin-off its video teleconferencing business to a new corporation was for legitimate business reasons, totally unrelated to the licenses themselves. In support of this, Travenol states that the licenses represent an insignificant portion of the assets transferred between the parties.

DISCUSSION

3. Pursuant to Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, the Commission may waive any provision of its rules if good cause is shown and if granting the waiver would not undermine the policies served by the rule. *Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir. 1983); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). The underlying public policy purpose for prohibiting the assignment of unconstructed stations is to prevent the trafficking of OFS licenses.[1] That does not appear to be a problem here. Travenol has shown that these stations were originally intended to fulfill internal business communications and were applied for before the Commission permitted private carrier systems. Furthermore, American is a newly established corporation formed by Travenol's restructuring and is made up of the employees of Travenol who have had day-to-day control over their stations. Travenol plans to obtain its required transmission service from American. It therefore appears that the assignments are merely incidental to an overall corporate restructuring and reorganization. Consequently, a waiver of the prohibition on assignment of a license prior to construction is warranted.

4. Accordingly, pursuant to Section 0.331, 47 C.F.R. § 0.331, the request of American for waiver of Section 94.47(b) for the referenced applications is GRANTED for an indefinite term.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and
Microwave Division

FOOTNOTE

[1] *See* Private Carrier Systems, FCC 85-53, 57 R.R.2d 1486, 1506-07 n.53 (1985)

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 88-373

In the Matter of

Amendment of Part 90 of the Commission's Rules to Permit Business Radio Use of Certain Channels in the 150 MHz Band	RM-6276

ORDER EXTENDING COMMENT PERIOD

Adopted: October 14, 1988; Released: October 18, 1988

By the Acting Chief, Private Radio Bureau:

1. On July 20, 1988, the Commission adopted a *Notice of Proposed Rule Making* (*Notice)* in the above-captioned matter which was published in the *Federal Register* on September 13, 1988, at 53 Fed. Reg. 35339. The published deadlines for filing comments and reply comments to this *Notice* were September 29, 1988, and October 14, 1988, respectively. These dates were subsequently extended to October 14, 1988 and October 31, 1988 by an *Order* adopted on September 27, 1988.[1]

2. On October 7, 1988, we received a request from Teletech, Inc. (Teletech) to further extend the comment periods for at least 120 days. Teletech indicates that this extension will allow it to complete a survey of Business Radio Service users to obtain their input about the issues raised by this proceeding. We believe that such a survey will increase the information contained in this docket and therefore will grant the extension. We also believe, however, that four months is an excessive request. We therefore will extend the comment deadlines in this proceeding for sixty days.

3. Accordingly, IT IS ORDERED, pursuant to the authority set forth in Section 0.331 of the Commission's Rules, that the deadline for filing comments to the subject *Notice of Proposed Rule Making* is extended to December 14, 1988, and the deadline for filing reply comments is extended to January 6, 1989.

FEDERAL COMMUNICATIONS COMMISSION

Beverly G. Baker
Acting Chief, Private Radio Bureau

FOOTNOTE

[1] Order Extending Comment Period, 53 Fed. Reg. 39114 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-268

In the Matter of

Advanced Television Systems
and Their Impact on the
Existing Television Broadcast
Service

Review of Technical and
Operational Requirements:
Part 73-E, Television Broadcast
Stations

Reevaluation of the UHF Television
Channel and Distance Separation
Requirements of Part 73 of the
Commission's Rules

ORDER EXTENDING TIME FOR FILING COMMENTS

Adopted: October 14, 1988; Released: October 14, 1988

By the Chief, Mass Media Bureau:

1. On September 30, 1988, the Association of Maximum Service Telecasters, Inc. and the National Association of Broadcasters (petitioners) jointly filed a motion to extend the time for filing comments in this proceeding. The petitioners requested that the time for comments be extended from October 31, 1988, to November 30, 1988, and that the time for reply comments be extended from December 1, 1988 to January 9, 1989.

2. In support of its motion, MST and NAB argue that the *Tentative Decision and Further Notice of Inquiry* [1] *(Further Notice)* raises a large number of complex issues that are of great import to the broadcast industry, other media, and consumers, and that the bulk and significance of the issues require an unusual degree of evaluation and deliberation. The petitioners also argue that parties must assemble and evaluate information regarding the specific characteristics of proponent ATV systems generated by the Systems Subcommittee of the Advisory Committee on Advanced Television Service during the same time period. The petitioners conclude that the comment periods established in the *Further Notice* are not adequate to provide useful responses.

3. The National Broadcasting Company, Inc. (NBC), on October 5, 1988, filed comments in support of the motion. In addition to supporting the reasons set forth by the petitioners, NBC also argues that many of their technical personnel assigned to work on this proceeding have been occupied with other matters, and that the public interest will benefit if the comment period is extended.

4. For the reasons stated by MST and NAB, and NBC, we believe that good cause exists for granting the extension requested.

5. Therefore, IT IS ORDERED, that the date for filing comments on the *Further Notice* in MM Docket 87-268 is extended to *November 30, 1988*, and that the date for filing reply comments is extended to *January 9, 1989*. This action is taken pursuant to authority found in Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 155(c) (1982 and Supp. V), and Section 0.283 of the Commission's Rules, 47 C.F.R. §§0.283 (1987).

6. For further information contact David R. Siddall, Policy and Rules Division, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

FOOTNOTE

[1] MM Docket 87-268, FCC 88-288 (released September 1, 1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 87-345

In re Applications of

COM/NAV MARINE, INC. File No. 852127

To Construct a new Public Coast Station to Operate in the Maritime Mobile Service on the frequencies 156.80 MHz and 161.825 MHz at Mobile, Alabama

MOBILE MARINE RADIO, INC. File No. 852921

To Construct a Public Coast Station to operate in the Maritime Mobile Service on the frequencies 156.80 MHz and 161.825 MHz near Foley, Alabama

Appearances

Harold Mordkofsky, *John A. Pendergast*, and *Caressa L. Davison* on behalf of Com/Nav Marine, Inc.; *Martin W. Bercovici* and *Maureen A. O'Connell* on behalf of Mobile Marine Radio, Inc.; and *Robert P. DeYoung*, *Robert H. McNamara*, and *Ralph A. Haller* on behalf of the Private Radio Bureau.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
EDWARD J. KUHLMANN

Issued: September 26, 1988; Released: October 21, 1988

1. Com/Nav Marine, Inc. and Mobile Marine Radio are mutually exclusive applicants for 161.825 MHz in the VHF-FM band allocated to local public coast stations, at Mobile, Alabama and Foley, Alabama respectively. The applications were designated for hearing on the following issues, 2 F.C.C. Rcd 5456 (1987):

a. To determine whether MMR's application is, as a matter of fact, an additional frequency request subject to the need showing of Section 80.371(c) of the rules and, if so, whether it is fatally defective for lack of the required showing.

b. Contingent upon the outcome of Issue (a), to determine which application should be granted based on the following comparative issues:

1. To determine the facts with respect to the facilities, personnel, rates, practices, interconnection with land line facilities and services of each applicant, including the geographical area proposed to be served by each.

2. To determine the nature and amount of traffic be handled by each of the proposed stations and from what sources such traffic will be derived.

3. To determine each applicant's proposed methods of operating local service public coast stations.

4. To determine the extent to which competition will be fostered by each of the proposed stations, and

5. To determine, in light of the evidence adduced on the issues above, and in light of existing service available, which application should be granted in the public interest, convenience and necessity.

2. A prehearing conference was held on November 6, 1987 and cross-examination of written cases was held on December 14 and 15, 1987. The record was closed on December 15, 1987. The applicants and the Private Radio Bureau filed proposed findings and conclusions of law on January 29, 1988 and the applicants and the Private Radio Bureau filed replies on February 12, 1988.

FINDINGS OF FACT

Issue a.: Whether MMR's application is an additional frequency request subject to need showing pursuant to Section 80. 371 (c)[1]

3. MMR is the licensee of public coast facilities in southern Alabama at the following locations on the following working channels: Coden (Channels 25, 26), Mobile (Channels 28, 87), Calvert (Channels 24, 85), Grove Hill (Channel 86), Myrtlewood (Channels 25, 28), Demopolis (Channel 84), and Tuscaloosa (Channel 27). MMR Exh. 1, Attach. B-3. They all operate with the call sign WLO. The service contour of MMR's existing Mobile facilities and the service contour of the proposed Foley facility will overlap more than 70%. Tr. 11. The Foley station will duplicate 100 percent of the overwater coverage of MMR's existing public coast facilities at Mobile. MMR Exh. 2, at 2-5. All of the navigable water, 1,315.1 square miles, served by MMR on Channels 28 (162.000 MHz) and Channel 87 (161.975 MHz) at Mobile will be within the service contour of MMR's proposed Foley site. MMR Exh. 2 at 2-5.

4. The Foley contour will also cover 100 percent (40 of 40 square miles) of the overwater coverage provided by MMR's existing VHF public coast facilities at Calvert, Alabama. MMR Exh. 2, at 2-5. These facilities operate on two channels, Channels 24 (161.800 MHz) and 85 (161.875 MHz). Com/Nav Exh. 1, at 9. The Foley contour will also overlap 70.8% (3078.8 of 3450 square miles) of the overwater coverage of MMR's existing VHF public coast facilities at Coden, Alabama. MMR Exh. 2, at 2-5. The Coden facilities use Channels 25 (161.850 MHz) and 26 (161.900 MHz).

5. The proposed Foley contour will also serve a part of Pensacola Bay. MMR Exh. 2, Attach. A and B. This is an area that MMR does not serve with its current VHF channels but it is an area already served by another public

coast station and is within coverage of the regional MF band and high seas HF band operated by MMR at Mobile. MMR Exh. 1, at 1-3, 1-4, 1-14, and 1-16.

6. The current channels operated by MMR at Mobile handle only calls per day. MMR Exh. 1, at 1-18. Moreover, the Mobile overwater contour is wholly within the contour of its Coden facility which also has two channels. MMR Exh. 2, Attach. A. According to MMR's testimony the Mobile channels are underutilized and one Mobile channel could be moved to Foley without any interference problem. Tr. 279. And, in fact, MMR concedes it has contemplated doing that. *Id.* MMR also believes it could move Channel 25 from Coden to Foley. MMR concedes that it could not show a need for a new VHF channel at Mobile. MMR Exh. 1, at 1-18.

Issue b.1.: Facilities, personnel, rates, practices, interconnection with landline facilities and services of each applicant, including geographical area proposed to be served by each applicant.

7. MMR is a full service maritime communications company offering a full range of telegraphy and radiotelephony services. MMR Exh. 1, at 1-3. The Foley transmitter site will consist of two GE VHF marine radio transmitters and receivers with the antenna located on a leased tower with back-up power. *Id.* at 1-14. The equipment will be located in an equipment building with around-the-clock access by means of a building key. *Id.* at 1-14. The station will be controlled from MMR's central control point. *Id.* at 1-14, 1-4.

8. MMR's control point will be manned on an around-the-clock basis where eight operators cover the radiotelephone service. *Id.*, at 1-6. The number of operators on duty will vary based on call volume. *Id.*, at 1-6; Tr. 213. Other operating, support and administrative personnel support the station with 5-6 licensed maintenance technicians available. *Id.*, at 1-7; Tr. 169. These personnel service MMR's approximately 80 transmitters. Tr. 214-15.

9. MMR concurs in the The BellSouth Telephone Companies FCC Tariff No. 8 and charges an interconnect charge of2.57 for the first three minutes and0.41 for each additional minute. The customer also pays landline toll charges. *Id.*, at 1-13. A toll-free 800 number is available to land-based customers. *Id.*, at 1-10.

10. MMR interconnects with the landline telephone network through 4-wire interconnect circuits and by a microwave circuit from its control point to downtown Mobile to the Main and Toll Central Office. *Id.*, at 1-12, 1-13.

11. In addition to serving Mobile, the Alabama coastal zone, the associated ports and adjacent waters served by MMR's existing facilities, the Foley station would extend MMR's coverage to Pensacola Bay and some additional offshore waters of the Gulf of Mexico. *Id.*, at 1-14.

12. Com/Nav proposes to use a General Electric KT-48-A transmitter to operate its working channel at 15 watts output power. Com/Nav Exh. 2, at 1. The antenna will be mounted on the roof of the First National Bank Building in Mobile, Alabama. *Id.*, at 1. The control point will be connected to the transmitter site by wireline circuit. The control point, located 6 miles from the transmitter site, is a 24-hour telephone answering service operated by Com/Nav's affiliate, Mobilecomm of Alabama, Inc. The control point will feature a battery for a backup power system with a backup generator scheduled for January of 1988. The transmitter will be provided with auxiliary power by a General Power Service battery already in place. Com/Nav Exh. 2, at 3.

13. Com/Nav has been providing VHF public coast station service since 1972 and currently operates 10 coast stations at various locations utilizing VHF channels. Com/Nav Exh. 3, at 2. The overall day-to-day supervision of all Com/Nav public coast operations is by its vice president, technical facilities, who has 11 years experience in marine radio operations. Technical and maintenance aspects of the proposed station will be supervised by a technical projects staff supervisor with 12 years experience maintaining and operating marine radio stations. *Id.*, at 2-3. On-site monitoring and maintenance will be provided by a system technician of Com/Nav's affiliate, Mobilecomm of Alabama, who works in the building housing the proposed station and who is generally on site during business hours. *Id.*, at 3. In the event the system technician is unavailable, or needs assistance, maintenance and repair services will be provided by Radio & Electronics Service Co., which employs a lead technician with 13 years experience and three additional technicians. *Id.*, at 4. Dispatching of calls will be handled by the operator staff of the telephone answering service which will be the station's initial control point.

14. Com/Nav proposes to impose an interconnect charge of 2.55 for the first three minutes plus0.85 per minute thereafter. These charges do not include landline toll charges. Com/Nav Exh. 4, at 1. Com/Nav contemplates revision of its rates at various times in the future to react to the dictates of the competitive market. *Id.*, at 2.

15. Com/Nav will interconnect to the land-line telephone system by means of a dial-line-to-circuit connection which will be effectuated by one of the station's operator personnel. Com/Nav Exh. 5. While Com/Nav's system will be fully capable of duplex transmission, a hybrid combiner function will be used at the site to activate the station upon receipt of a ship-to-shore signal. *Id.*

Issue b.2.: The nature and amount of the traffic to be handled by each of the proposed stations and from what sources traffic will be derived.

16. MMR vice president, John D. Klemm, believes that the users of the service will be tows coming across the Gulf, fishing vessels, shrimp boats, and deep draft vessels. Tr. 288-90.[2] MMR claims that it expects to carry 40 calls per day. MMR Exh. 1, at 1-16. MMR, today, averages nine calls per day at its Mobile, Alabama station. MMR Exh. 1, at 18.

17. Com/Nav, relying on its experience with existing coast stations, asserts the belief that it will handle 20 calls per day in Mobile. Com/Nav Exh. 8, at 3. Tr. 81. Com/Nav surveyed 40 "present subscribers" and 28 of those subscribers said they would consider using the proposed facilities when they were in the Mobile area. Com/Nav Exh. 8, at 1-2 and Attachment A. Com/Nav assumed that the traffic would be similar in the Mobile area. Tr. 81. None of those questioned stated they would use Com/Nav's service. Tr. 78-79. The 40 people were selected by "an unscientific process" of simply calling 40 customers, according to Com/Nav witness Ernest Oswalt. Tr. 76. There was no attempt to identify whether those questioned spent time in the proposed Mobile service area. Tr. 77. There also was no effort to identify whether the persons surveyed currently use VHF maritime mobile service. Tr. 77-78. Com/Nav's existing stations are at in-

land river points except for one along the Texas coast and Com/Nav believes the traffic patterns will be different at Mobile from inland river traffic. Tr. 51.

Issue b.3.: The applicants' methods of operating local service public coast stations.

18. Under Com/Nav's proposed method of operation, a ship calling the station on its working frequency will break the squelch of the station's receiver, thereby activating a "Riverpatch" microprocessor. The signal is then passed by an automatically dialed telephone circuit to the control point operator. Com/Nav Exh. 9, at 1. Channel 16, the distress, safety and calling frequency will be aurally monitored by means of a "squawkbox." Tr. 58. Land-to-ship calls will be broadcast by the control point operator on Channel 16. Upon acknowledgement by the ship station, the operator will switch the ship to the working frequency and interconnect the parties. Com/Nav Exh. 9, at 1. A staff of 22 operators, who will be trained in handling marine traffic, will be available. At least two operators will be on duty 24 hours a day. *Id.*, at 2. Com/Nav proposes to have a full-time maintenance technician at the transmitter site who will have a full array of diagnostic and repair equipment and spare parts. *Id.*, at 3. Additional maintenance personnel will be available from Com/Nav's Pensacola affiliate 60 miles away. *Id.*, at 3.

19. Com/Nav proposes an alarm monitor located at its control point to monitor the stations RF output. *Id.*, at 4. Com/Nav will have access to maintenance personnel either locally or at Pensacola at all times by means of pagers. *Id.*, at 4. While Com/Nav's billing system does not involve international billing practices in accordance with the International Radio Regulations, it will establish such practices if customers' needs require it. Tr. 90-91.

20. MMR will establish contact with ships on either its working frequency or on Channel 16. MMR has a routine billing process for its large base of 8,000 established customers. MMR Exh. 1, at 1-11. For land originated calls to ships, MMR has a "call back" procedure which involves obtaining the information necessary to establish contact with a ship and then calling the land party back to complete the call through its interconnect circuits. *Id.*, at 1-10, 1-11. MMR's control point is manned around the clock. *Id.*, at 1-4. MMR broadcasts traffic lists which provide an additional means for ships to learn of shore originated calls. *Id.*, at 1-5. A total of eight operators handle MMR's telephone service with 1 to 4 on duty depending on traffic volume. *Id.*, at 1-6. MMR's maintenance staff provides coverage 12-15 hours a day and is available by pagers at other times. *Id.*, at 1-7.

Issue b.4.: The extent to which competition will be fostered by the proposed stations.

21. MMR did not provide findings on this issue but, instead, stated that its rates and method of operation would foster competition. MMR Proposed Findings at 34. Com/Nav suggests, without specific findings, that because MMR is already serving the area, competition will not be fostered by granting MMR's application. Com/Nav Proposed Findings at 47-48.

CONCLUSIONS

Issue a.: MMR's application is an additional frequency request subject to the need showing of Section 80.371(c) and it is fatally defective for lack of the required showing.

22. Public correspondence frequencies in the maritime service, which are assigned to ship and public coast stations, are described in 47 C.F.R. §80.371. Those working frequencies assigned to the 156-162 MHz band, which include the frequencies applied for by these applicants, are described in §80.371(c). That section provides that initial grants will be limited to one working frequency. An additional frequency may be assigned "when the assigned working frequency is also used by a foreign station near enough to result in harmful radio interference by simultaneous operation or when the channel occupancy of the assigned frequency or frequencies exceeds 40 percent during the busiest hours of operation." *Id.* That rule provides a specific method for making a showing to receive another frequency. *Id.*

23. On April 29, 1987, before these applications were designated for hearing, the Commission proposed amending §80.371(c) to explain that an additional frequency subject to the need showing is one "which overlaps by 70% or more the coverage area of a frequency already authorized for use by a station licensed to the same applicant." *Notice of Proposed Rule Making to Amend Part 80 of the Rules Concerning Applications for VHF Public Coast Stations*, 2 F.C.C. Rcd 3213, 3214 (1987). The proposed change was adopted on November 24, 1987, before the hearing was held in this proceeding. *Amendment of Part 80 of the Rules Concerning Applications for VHF Public Coast Stations*, 3 F.C.C. Rcd 2562 (1987). Preceding this change the Commission required applicants to demonstrate on a case-by-case basis that the request was for a new license and not one for an additional channel. *Notice, supra.*, 2 F.C.C. Rcd 3213. In practice the Private Radio Bureau considered the application to be for an additional channel if the coverage area of the additional working frequency overlapped the coverage of the existing station by 70% or more. *Id.* The Bureau applied the 70% overlap test to insure that applicants did not designate a new nearby location to avoid the need study and stock-pile the frequency. *Id.* The rule making proceeding "formalized" the coverage area figure. *Id.*

24. MMR is applying to use 156.80 MHz and 161.825 MHz at Foley, Alabama. When MMR first applied on July 1, 1986, the Bureau analyzed MMR's application in relation to its other maritime holdings. MMR already operates eleven channels on eleven frequencies in southern Alabama. The Foley proposal overlaps 70% or more with VHF frequencies it operates on in Coden, Calvert, and Mobile, Alabama. MMR did not submit with its application a demonstration that the channels already assigned were occupied 40% of the time during the busiest hours. Thus, the Bureau returned MMR's application and explained about its findings of overlap with MMR's WLO (the call letters used by MMR stations) existing service areas. MMR was, however, given an opportunity to refile with the 40% showing of channel use and to assert, on that basis, that the additional channel was needed.

25. MMR resubmitted its application and, while it made changes in its proposal, it did not submit a study showing that the channel was needed. Instead, it appealed the dismissal and claimed that because the 70% standard was not included in §80.371(c), it should not be applied to its

Foley proposal. The Bureau then concluded that it would accept MMR's application and provide MMR and Com/Nav, a previously pending mutually exclusive applicant for the frequencies, an opportunity to establish in a hearing whether MMR's application is or is not an additional frequency. The Commission stated, when it amended §80.371 before the hearing, that, despite the acceptance of MMR's application, the 70% standard could be applied to MMR's Foley proposal to resolve whether the proposal represents a request for an additional frequency. *HDO, supra.*, 2 F.C.C. Rcd 5456 (1987); *Amendment, supra.*, 3 F.C.C. Rcd 2562.

26. MMR submitted no findings on this issue. Its failure to do so precludes consideration of any factual arguments it makes. Its principal argument is that it had no notice of the 70% standard and, therefore, it would not be fair if that standard were applied to its Foley proposal. Because it has not proposed contrary findings to those made by the Bureau, it must be assumed that if the 70% standard is applied, MMR's proposal must be denied because it has not made the need showing required by §80.731(c). There is little question that, even before MMR filed its application it had notice that its proposal for Foley might be considered a request for an additional frequency. §80.371(c) limits the number of working carrier frequencies an existing licensee may have for the service area, not a specific geographic place like Mobile. In addition, since 1983, MMR has been on notice that the Commission expected "the availability of more than one service offeror to a ship in a given area." *VHF Public Coast Station*, 53 Rad. Reg. (P & F) 2d 1228, 1230 (1983). The Commission explained that its preference for multiple offerors was premised on the belief that their existence would result in "either lower costs or improved services." *Id.*

27. Since Com/Nav filed first for Mobile, MMR was aware that that policy goal was about to be achieved in the Mobile service area where it already held frequencies, that is unless it could demonstrate that it should have the frequencies Com/Nav sought. The only question that could have existed for MMR was whether applying for the frequency in nearby Foley with a contour that substantially overlapped its existing service areas would be considered by the Commission as an additional frequency. MMR has not disputed that the Bureau routinely reviewed applications for maritime mobile frequencies to see if a need showing was required and to determine whether its policy goal of competition was being met, even when an applicant claimed it was a new facility.[3] The 1983 Commission policy statement notified applicants that individual mobile marine proposals would be reviewed to test their compliance with the competition policy objectives. Moreover, at the time, the Commission specifically eschewed enacting rules to achieve the objectives and potential applicants were on notice that proposals would be reviewed on a case-by-case basis. *VHF Public Coast Stations, supra.*, 53 Rad. Reg. (P & F) 2d 1228, 1230-31. There is, however, no question that MMR was specifically told when its application was returned in 1986 that it was considered one for an additional frequency. MMR was then provided an opportunity to show that the frequency was needed. There was then no evident reason why MMR could not have adjusted its proposal to avoid dismissal and the 70% standard.

28. MMR, without pointing to proposed findings, argues that to have altered its proposal to comply with the 70% standard after the time it did have specific notice of the standard would have resulted in a change so major that it would have had to refile. It claims it then would have been no longer eligible for the frequency because the time for applications had lapsed. That assertion is not evident; Com/Nav has suggested a number of amendments that MMR might have made that would have saved its proposal from being dismissed with prejudice. Com/Nav points out that MMR could have reduced power, switched frequencies from one area to another, or requested a waiver. Whatever merit there is to Com/Nav's suggestions, the burden was on MMR to establish the public interest benefits of its proposal, in light of the significant overlap it proposes with the facilities it already operates. Section 80.371(c) leaves no doubt that a showing will be required by an applicant requesting another frequency and that it will not receive one if there is no need. It should be noted that MMR told the Commission it believes the 70% overlap standard is a reasonable regulation to apply to test whether a frequency request is actually for a new service area but that it would not be fair to apply to its proposal for Foley. With that admission, MMR demonstrates that its claim of unfair treatment is premised on no more than an assertion of a private interest. MMR has not explained why that private claim should outbalance what MMR concedes are valid public interest objectives. The Communications Act makes the public interest paramount and it is only when a private interest coincides with the public interest that it becomes a valid concern of the regulatory process.

29. Instead, MMR would apply other standards to test whether its request is for a new service area. Primarily MMR argues that because its Foley proposal will reach the Pensacola Bay area, it should benefit from the major market exception applied in the Public Land Mobile Service. §22.16(b)(2) in that service exempts from the need showing proposals which have contours covering a major market not already served by the applicant. But as Com/Nav points out, there are different policy considerations in the maritime mobile service that have caused the Commission to use the 70% standard instead of the new market standard of the land mobile service. Com/Nav explains that a land mobile market has 44 assigned frequencies allocated while a maritime mobile market has only 9 assigned frequencies. It is evident that warehousing of frequencies is a much greater concern in a maritime mobile market. Com/Nav explains that, historically, entry into a maritime market has been different from land mobile markets. For example, even before the Commission initiated its policy to implement competition in the maritime mobile service, it was encumbent on a licensee to establish a 50% use level before a new frequency would be granted. But even if that land mobile policy presented a valid analogy for the maritime service, MMR's proposal would fail to receive new major market credit. Both the Bureau and Com/Nav point to record facts which show that MMR will cover only part of Pensacola Bay, at the fringe of its contour, not the entire market. In addition, MMR's existing Coden contour already reaches that area.

30. MMR also argues that even where there is existing service the Commission has approved new service without a showing that the old frequencies are being used sufficiently if the applicant would be providing new service. For that argument MMR relies on the Commission's decision in *A. P. St. Phillip, Inc.*, 40 F.C.C. 2d 4, 15-16 (1973) and *Radio Telephone of Louisana, Inc.*, 68 F.C.C. 2d 653, 656 (1978) which it claims permits granting a new

proposal even though there would be duplication of service. But while new service to new markets was weighed in those cases, the Commission's concern was with duplication provided by existing licensees, not the new applicant. The new applicants represented new competitors to those licensees already in the market. That, of course, is not the case here where a grant of MMR's overlapping coverage would foreclose a competitor and duplicate coverage in a market it already reaches.

31. MMR urges that its Foley station will implement the Commission's goal of establishing public coast stations every 30 miles in different localities. *Citing Report and Order, Public and United Coast Stations*, 35 F.C.C. 2d 642, 646 (1972). But that argument, even if meritorious, is not supported by the facts. The Foley station, according to MMR, is 22 miles from its Coden site and 37 miles from Pensacola. The Commission set the spacing at 30 miles to avoid the overlap it believed might occur at 25 miles. *Id.* The Foley proposal not only fails to meet the letter of the policy but it also results in more than a 70% overlap with its existing Coden facility, which the mileage separations were intended to prevent.

32. MMR has failed to propose findings to support its claims and it has failed to establish that its Foley proposal should be considered a new facility exempt from the need showing required by §80.371(c). The record reflects that MMR's frequencies in Mobile are not receiving extensive traffic. Its argument of unfairness is not supported by record facts. Instead, MMR has chosen to maintain a posture which, if agreed to by the Commission, would result in its stockpiling frequencies and undermining competition in the maritime mobile service at Mobile, Alabama. Its application will, therefore, be denied.

Amendments

33. Com/Nav petitions for leave to amend its technical proposal to correct a typographical error. Good cause exists for accepting the amendment.

34. Com/Nav also petitions for leave to amend to report that a transfer of control of Com/Nav from Middle-South Communications System to Mobile Communications Corporation of America. Good cause exists for accepting the amendment.

Motion to Enlarge

35. MMR petitions to enlarge issues against Com/Nav to determine whether it violated §1.65 and lacked candor in failing to report a partial merger between Com/Nav's parent Mobile Communications Corporation of America and BellSouth Corporation. MMR alleges that Com/Nav withheld information about the merger because it will have an impact on Com/Nav's comparative proposal.

36. As an initial matter it is apparent that Com/Nav has not in all respects complied with §1.65. That rule requires that a formal request and showing of good cause be submitted for changes in an application and information which is of decisional significance. A request is required (whether it is part of the application or simply part of the overall record), if the information supplied "is no longer substantially accurate and complete in all significant respects." The request to notify and make the change should never be made later than 30 days. The letters filed by Com/Nav were and are inappropriate filings under the Commission's rules. *Belo Broadcasting Corp.*, 44 F.C.C. 2d 534, 537 (1973). Thus, the timing, form, and possibly the substance of Com/Nav's letters from counsel do not comply with §1.65. There is, however, no evidence that Com/Nav acted in bad faith or that it has on other occasions failed to report decisionally material information. The information about the merger filed by Com/Nav appears to change how its facility will receive maintenance and raises a question about whether the personnel would be part of the Com/Nav parent as Com/Nav represented in its exhibits and testimony. That change would alter the facts about its maintenance proposal. Com/Nav has now given notice of that possibility without complete details. But, because the change has not occurred and because those changes are contingent on a number of regulatory approvals, it would be speculative to weigh them either against or for Com/Nav in this proceeding. MMR has not shown that the information filed by Com/Nav is either so inadequate or inaccurate that the Commission has been or could have been deceived. The petition to enlarge will be denied.

ACCORDINGLY, IT IS ORDERED that the petition for leave to amend, filed December 14, 1987 by Com/Nav Marine, Inc. IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the petition for leave to amend, filed August 4, 1988 by Com/Nav Marine, Inc. IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the supplement to record, filed December 28, 1987 by Com/Nav Marine, Inc. IS ACCEPTED.

IT IS FURTHER ORDERED that the motion to enlarge, filed August 15, 1988 by Mobile Marine Radio, Inc. IS DENIED.

IT IS FURTHER ORDERED that the motion to strike, filed September 14, 1988 by Com/Nav Marine, Inc. IS DENIED.

IT IS FURTHER ORDERED that the request for leave to file motion for summary decision and motion for summary decision, filed December 9, 1987 by Com/Nav Marine, Inc. ARE DISMISSED AS MOOT.

IT IS FURTHER ORDERED that the application of Mobile Marine Radio, Inc. (File No. 852921) IS DENIED and the application of Com/Nav Marine, Inc. (File No. 852127) for a construction permit to operate a public coast station in the Maritime Mobile Service on the frequencies 156.80 MHz and 161.825 MHz at Mobile, Alabama IS GRANTED.[4]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTES

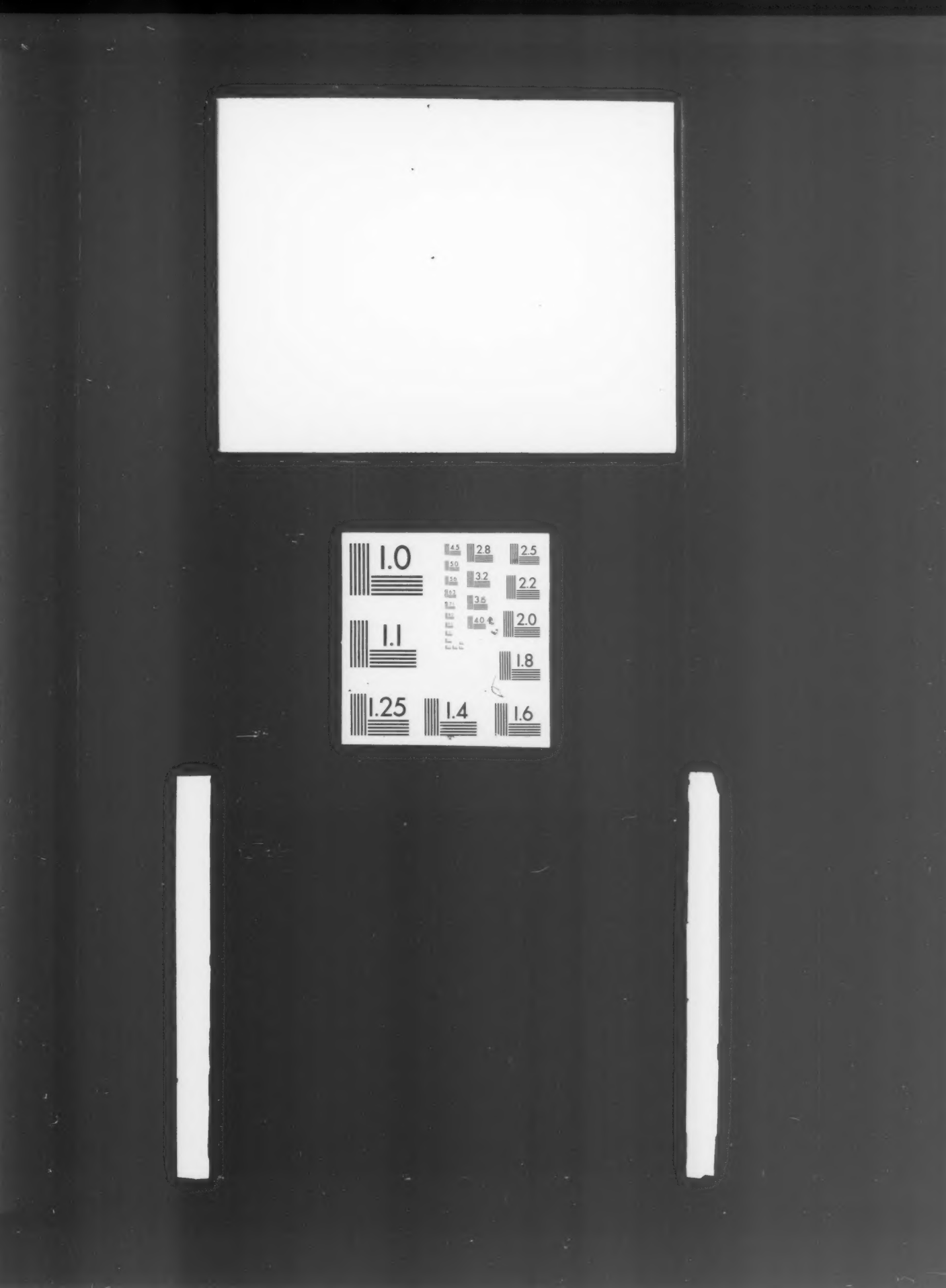
[1] MMR failed to comply with the order in this proceeding that it submit proposed findings on issue a. That failure is deemed to be a waiver of the right to participate further on any findings made on this issue. 47 C.F.R. Section 1.263(c). *See Comuni-Centre Broadcasting, Inc.* v. *F. C. C.*, No. 87-1331, slip op. (D. C. Cir. September 16, 1988). MMR did submit conclusions of law on issue a. and those will be considered. MMR in its reply argued about its overlap coverage in a footnote but it has not suggested

findings as directed. Nor has it suggested that it would not exceed a 70% overlap with existing facilities if 161.825 MHz were licensed to it.

[2] MMR also suggests that it would receive traffic which Southern Bell at Pensacola could not handle citing MMR Exh. 1 at 15, but that finding cannot be made since that page of Exh. 1 is not evidence in the record. The additional findings at page 2 of its proposed findings are also not included in the record.

[3] The Bureau suggested during the hearing that MMR employee, Larry Cagle, who prepared MMR's application, discussed MMR's proposal with Bureau personnel before MMR filed and he was told about the 70% standard. Tr. 24. MMR did not request an opportunity to submit statement from Mr. Cagle or submit him to examination about the Bureau's claim. If the Bureau's allegations are correct, then it appears that MMR is arguing in bad faith. The matter is unresolved on the current record.

[4] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Section 1.276(d).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